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No. 8642

Vol 20 30

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of the Petition of
DOLORES LOPEZ NUNEZ,
For a Writ of Habeas Corpus.

WALTER E. CARR, District Director of Immigration
of the United States for the Los Angeles District,
No. 20,

Appellant,

vs.

DOLORES LOPEZ NUNEZ,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

AUG 23 1937

PAUL P. O'BRIEN,

CLERK

Parker & Baird Company, Law Printers, Los Angeles.

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant:

PEIRSON M. HALL, Esq.,

United States Attorney,

LEO V. SILVERSTEIN, Esq.,

Assistant United States Attorney,

610 South Main Street,

Los Angeles, California.

For Appellee:

DAVID C. MARCUS, Esq.,

333 West Second Street,

Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To DOLORES LOPEZ NUNEZ, Petitioner and Appellee herein, and to DAVID C. MARCUS, Attorney for said Dolores Lopez Nunez: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 21st day of August, A. D. 1937, pursuant to an appeal allowed and filed July 22, 1937 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain habeas corpus proceeding wherein Walter E. Carr, District Director of Immigration of the United States for the Los Angeles District, No. 20, is appellant and you are appellee, and to show cause, if any there be, why the judgment, order and decree discharging the above named Dolores Lopez Nunez from the custody of the said Walter E. Carr, District Director of Immigration of the United States for the Los Angeles District No. 20, in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 22nd day of July, A. D. 1937, and of the Independence of the United States, the one hundred and sixty-second.

Paul J. McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: Received copy of within Citation this 22 day of July, 1937 David C. Marcus S Stoner Attorney for Defendant. Filed Jul. 22 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

IN THE MATTER OF THE)	
PETITION OF)	PETITION FOR
	WRIT OF
DOLORES LOPEZ NUNEZ)	HABEAS
	CORPUS
FOR A WRIT OF HABEAS)	NO. 13092 M
CORPUS)	

TO THE HONORABLE DISTRICT COURT OF
THE UNITED STATES, FOR THE SOUTH-
ERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION:

The petition of DOLORES LOPEZ NUNEZ, respectfully shows:

I.

That your petitioner was born on the 26th day of May, 1908 at Guadalajara, State of Jalisco, Republic of Mexico and is a citizen of the Republic of Mexico. (Page 1—Exhibit A)

II.

That your petitioner was legally admitted to the United States approximately the year 1914 and continuously resided therein and departed therefrom about the year 1920.

That on the 8th day of December 1922 petitioner was again legally and lawfully admitted to the United States at Tia Juana, California. That at said time and place Form 603, Bill and Notice for Head Tax No. 15317 was

issued at Tia Juana, California in the name of Domingo Lopez and Margarita S. de Lopez and Marcelina Lopez showing amongst other things admission on same date and accompanied by Dolores Lopez, your petitioner, 12 years of age. That ever since said time your petitioner has continuously been a resident of the City of Los Angeles, County of Los Angeles, State of California within the jurisdiction, district and division of the above entitled Court. (Page 3—Exhibit A)

III.

That on the 30th day of July, 1924 at Los Angeles, California, your petitioner married one Castulo Nunez and ever since said time and now is known as Dolores Lopez de Nunez. (Page 3—Exhibit A)

IV.

That on the 18th day of April, 1927 at San Ysidro, California, Border Crossing Identification Card Form 687 duplicate No. 3767 was issued to your petitioner, Dolores Lopez de Nunez, by Henry Y. Hackett, Inspector in Charge, reissued on four separate occasions last date bearing March 16, 1932. That said document contains notation: "United States Resident". (Page 10—Exhibit A)

V.

That on or about the 13th day of June, 1935 within the District and Division of said Court and within its Jurisdiction your petitioner was arrested and restrained of her liberty and is now held in constructional custody by the Honorable A. E. Carr, District Director of Immigration of the Los Angeles District, Harry Blee, Assistant Di-

rector; and Judson F. Shaw, Inspector in Charge of the Immigration and Naturalization Service at Los Angeles, California, by virtue of a purported warrant of arrest issued by the Honorable Secretary of Labor at Washington, D. C. dated May 25, 1925 charging your petitioner in code as follows:

1. A person likely to become a public charge at the time of entry.

2. Becoming a public charge within Five Years after your entry into the United States from causes not affirmatively shown to have arisen subsequent thereto. (Page 1—Exhibit A Hearing June 13, 1935)

VI.

That pursuant to said warrant, in the City of Los Angeles, California and on the following dates: the 18th day of June, 1935; 10th day of January, 1936; 27th day of January, 1936; the 3rd day of February, 1936; the 21st day of February, 1936; and the 4th day of March, 1936, hearings were held and testimony was taken before a United States Immigration Officer to determine your petitioner's right to remain in the United States and why she should not be deported therefrom to the Republic of Mexico upon the grounds stated in said warrant. That a copy of said testimony is herewith attached, made a part hereof and marked Exhibit "A" and set forth herein the same as if stated verbatim. That said evidence is a complete record of the proceedings had before the Immigration and Naturalization Service of the Department of Labor and contains a full, true and correct copy of said hearings.

VII.

That thereafter to-wit and on or about the 6th day of July, 1936 a warrant of deportation was issued by the Department of Labor directing the deportation of your petitioner to the Republic of Mexico.

VIII.

That said warrant of deportation is unlawful, illegal, invalid, null and void and your petitioner is being unlawfully deprived of her liberty by said immigration officers and officers of the Department of Labor and Immigration and will deport her from the United States unless restrained by this Honorable Court for the following reasons:

1. That there is an absence of any substantial evidence in the record to sustain the warrant of Deportation and therefore the foregoing hearings and the results thereof were and are unfair.

2. That there is an absence of any substantial evidence in the record—(1) that your petitioner was a person likely to become a public charge at time of entry and (2) became a public charge within five years after entry into the United States from causes not affirmatively shown to have arisen subsequent thereto.

3. That it affirmatively appears that your petitioner was not a public charge at time of entry.

4. That it affirmatively appears that your petitioner did not become a public charge within five years after entry.

5. That if this Court should determine that your petitioner became a public charge within five years after en-

try that it affirmatively appears to have arisen from causes suffered subsequent to entry.

6. Because of the exercise of a mistaken theory of the law applicable to the record herein.

7. Because of the arbitrary and capricious actions of said officers.

8. By reason of the exercise of an abuse of discretion vested in said Department.

9. That petitioner was denied the due process and equal protection of the law in violation of Article I Section 4 of the Constitution of the United States and the XIV Amendment of the Constitution of the United States.

IX.

That there is an absence of any substantial evidence in the record to sustain the warrant of Deportation and therefore the foregoing hearings and the results thereof were and are unfair for the following reasons to-wit:

1. That said record discloses that the children of your petitioner are American Citizens whose names, ages, date and place of birth appear as follows:

Castulo Raul Nunez, born May 14, 1928, at Los Angeles, California, U. S. Age 9.

Alfredo Nunez, born December 22, 1929, at Los Angeles, California, U. S. Age 8.

Estella Nunez, born December 7, 1931, at Los Angeles, California, U. S. Age 6.

(Page 2—Exhibit A)

2. That the birth of said children was registered in the Office of the Health and Registrar of Health, Department of Health, City of Los Angeles. (Page 2-3—Exhibit A)

3. That it affirmatively appears from said record that on the 7th day of December, 1931 your petitioner “was admitted to the Los Angeles County Osteopathic Hospital, December 7th and left December 16, 1931.”

“Patient was delivered of a female infant December 7, 1931”.

“Seen in Clinic December 17, 1931. Complaint: pain and soreness in lower abdomen since child born one year ago. More pronounced on right side. Pain increased when patient works or stands. Occasional vaginal discharge, yellow. Discharge first appeared about 1 month post-partum. Eyes—external strabismus. No vision in right eye. Left eye vision good. No redness or discharge.” Physician’s note: Jan. 11, 1933: “Perineum fair. Uterus in good position, freely movable, normal size. Both tubes palpable and tender. Cervix rough. Diagnosis: Chronic double salpingitis; cervical erosion, thick discharge.” Physician’s note: June 21, 1933: “Tubes are not palpable this morning. Cervix has healed up nicely. Complains of some tenderness in bowels. Patient may be dismissed with instructions about diet, i. e., not so many beans and rice and more cooked vegetables—some fruit.” (Exhibit B—Report of Los Angeles County General Hospital, dated November 30, 1934.)

4. That it affirmatively appears that your petitioner did not become a public charge within five years of entry:

“BY COUNSEL TO ALIEN.

Q. Now prior to the death of your husband in September of 1931, you say you had not been receiving any aid or assistance from the County or State or Federal Government of any kind?

A. No.

Q. And you were during that time, that is, from the time of your marriage until the death of your husband, being supported in full by his earnings?

A. Yes.

Q. Now after the death of your husband or at the time of his death, where were you living?

A. With my mother.

Q. Was your husband with you then?

A. When he became ill, I went to my mother with my family and he stayed with his mother. He died in the Hospital.

Q. In what hospital did he die?

A. He died in the General Hospital.

Q. How long was he sick?

A. He was ill about eleven months before his death.

Q. When was it that aid and assistance of the County for any clothing or groceries was first furnished to you or your family?

A. During the latter part of the year of 1931 I received aid from the County first and then later from the State.

Q. What aid did you received?

A. I first only received groceries.

Q. Do you know who these groceries were for?

A. This aid, these groceries were for my children.

Q. Who was living at your mothers?

A. My mother Margarita Lopez and Josefina Lopez, my sister, and myself and my children.

Q. Now was your sister working at the time? A. Yes sir.

Q. For whom and how much was she earning?

A. I am not so very sure, but I believe it was \$15.00 per week, in a curtain factory.

Q. Now did you ask for any aid for yourself from the County or did you ask for aid for your children?

A. I asked for aid for my children. I never asked for aid for myself, but they gave me of their own pleasure some clothes and provisions.

Q. Now when did you first go to the clinic?

A. I first went to the clinic when I was expecting my last child at Temple Street. My husband had died before my last child was born.

Q. How many times did you attend the clinic?

A. I went there many times.

Q. What clinic was that, do you know?

A. The Maternity Clinic of the County of Los Angeles.

Q. Where was your child born?

A. My child was born at the County Hospital.

Q. And how long did you stay there?

A. I was there ten days.

Q. Then did you return home?

A. Then I returned to my mother's home.

Q. When did you first start receiving any money from the County of Los Angeles?

A. I first started receiving money in November 1932, but I am not very sure of that.

Q. How much were you receiving at that time?

A. Forty Dollars per month.

Q. Now how was that determined; you had four children did you not?

A. Yes.

Q. And were you receiving a certain amount for each child?

A. I was receiving \$10.00 a month for each child or a total of \$40.00 per month for all of them.

Q. Were you receiving any other assistance or any other help.

A. Nothing else.

Q. From this time in November of 1932, had you been receiving this \$40.00 a month continuously thereafter?

A. Yes.

Q. Until when?

A. Until my oldest child was killed. Until May of 1934.

Q. And then what was done with reference to your allowance or aid from the County?

A. Since May of 1934 I have been receiving \$30.00 a month. I have been receiving \$30.00 per month for the three children and \$2.25 additional. This \$2.25, I do not know what it is for. I am not sure, but possible from the S. E. R. A.

Q. Now from November 1932 until May 1934, did you receive any other aid or assistance in the form of money from the county of Los Angeles?

A. I received some clothes for myself and for my children and one small order of groceries.

Q. Now during this period of time were you living with your mother?

A. Yes.

Q. And was your sister working during this time too?

A. Yes.

Q. And was she assisting in supporting the family?

A. Yes, her family.

Q. You mean by that your mother?

A. My mother and my sister and my nephew.

Q. Did she help you any?

A. She paid half of the rent and half the bills and half everything.

Q. Did she buy your clothes?

A. When I needed something she would buy me clothes.

Q. When did you first visit the County Hospital?

A. I do not remember.

Q. Refreshing your memory, was it not in January, of 1933?

A. Yes, I think it was.

Q. Now prior to the time of your visit to the clinic after the death of your husband, have you received any aid or assistance of any kind from the County of Los Angeles?

A. No, I did not.

Q. The records show that you complained of soreness in the lower abdomen since the birth of your child one year before and that the pain was more pronounced on the right side. Were these complaints that you made at the time, to the best of your knowledge, occasioned by the birth of your child?

A. Yes, from the birth of my child.

Q. Did these pain*d* and illness come to you while you were a resident of Los Angeles and of the United States

A. Yes.

Q. Now in September 28, 1933, you attended the County Hospital and complained of pains in your chest and around your heart for about two months previous to that and at which time you complained that the pains would come on every few days and last from several hours to one day or more and that you had pains in the shoulder which would last about a week. Now were those complaints true?

A. Those are true.

Q. Now with whom did you talk to at that time, September 28, 1933, at the County Hospital?

A. With a doctor.

Q. Do you know his name?

A. No.

Q. Was it Doctor Galbraith?

A. I do not know.

Q. Now did you acquire these pains and did they continue during your residence and while you were living in Los Angeles, California?

A. Yes. Before my husband's death I did not have these pains, but *aferwards* I began to feel them.

Q. Did the doctor tell you that there was anything wrong with your lungs?

A. He told me I had two small infections in my lungs.

Q. I show you your alien's Identification Card No. 3767, duplicate of which has heretofore been introduced

in evidence in this case, and ask you when, if you can refresh your memory from this card and tell me, when it was that you departed from the United States from the record indicated on this card. Was it on March 18, 1932?

A. Yes, that was the date.

Q. Now between March 18, 1932, and August 1934, did you go out of the United States at all?

A. No, I did not.

Q. I am showing you this head tax receipt with the notations on the back of it and ask you if it is not a fact that on August 3, 1934, you did leave the United States for Mexico?

A. Yes, I remember going.

Q. And did you use this Alien's Exhibit No. 1 when you went out on that date?

A. Yes, I took it and used it.

Q. Now the other notation on here, some six others, did you use those at all?

A. My mother used them. My mother's name is Margarita, and Josefina did too.

Q. Now the notation on the side of this, August 3, 1934, date shows "Out temporarily to Mexico". Now is that the only time that you used this?

A. Yes.

Q. Where did you go?

A. I went to Tijuana and then I went from Tijuana to a little ranch outside of Tijuana."

X.

That your petitioner is not held by virtue of any complaint, indictment, presentment, warrant or guarantee, law, rule, regulation or order, except as above specifically set out.

XI.

That no other application for Writ of Habeas Corpus has been made by or on behalf of your petitioner.

WHEREFORE, your petitioner, DOLORES LOPEZ NUNEZ, prays that a Writ of Habeas Corpus issue directed to said Honorable A. E. Carr, Honorable Harry Blee and Honorable Judson F. Shaw, commanding them that they be and appear and to then and there produce your petitioner by them so detained before the above entitled Court to do and receive what shall then and there be considered concerning said petitioner.

DATED: This 1st day of March, 1937.

David C. Marcus

DAVID C. MARCUS,

Attorney for Petitioner.

UPON reading the above petition for a Writ of Habeas Corpus and good cause appearing therefor let the Writ issue returnable before this Court on the 15th day of March, 1937 at the hour of 10 A M of said date.

Dated: This 1st day of March, 1937.

Paul J. McCormick

JUDGE.

Dolores Lopez Nunez.

[Seal] R. S. ZIMMERMAN
Clerk U. S. District Court, Southern
District of California

By J. M. Horn
Deputy

[Endorsed]: Filed May 1 - 1937 R. S. Zimmerman,
Clerk By J. M. Horn Deputy Clerk.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

IN THE MATTER OF THE)
PETITION OF () NO. 13092-M
DOLORES LOPEZ NUNEZ, ()
FOR A WRIT OF HABEAS ()
CORPUS.)

THE PRESIDENT OF THE UNITED STATES

TO: HONORABLE W. E. CARR, HARRY BLEE and
JUDSON F. SHAW,
..... GREETING:

YOU ARE HEREBY COMMANDED to have the
body of DOLORES LOPEZ NUNEZ, by you impris-
oned, by whatever name she shall be called, the petitioner
for a Writ of Habeas Corpus in the above entitled case,
before the above entitled Court and the Honorable PAUL
J. MC CORMICK, Judge of said Court, at the Court
Room of said Court in the City of Los Angeles, Cali-
fornia, on the 15th day of March, 1937, at 10 A. M., to

do and receive what shall then and there be commended
in the premises and have you then and there this writ.

WITNESS The Honorable PAUL J. MC CORMICK
JUDGE of the said United States District Court, for the
Southern District of California, Southern Division.

Dated: This 1st day of March, 1937.

[Seal] R. S. ZIMMERMAN.
Clerk.

By J. M. Horn
J. M. Horn
Deputy Clerk

[Endorsed]: Filed Aug 10, 1937. R. S. Zimmerman,
Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

RETURN TO WRIT OF HABEAS CORPUS

I, HARRY B. BLEE, Assistant to the District Director of Immigration and Naturalization, Los Angeles, California, respondent herein, for my return to writ of habeas corpus herein, do hereby certify that I am unable to produce the body of the said DOLORES LOPEZ NUNEZ before this Honorable Court for the reason that the said DOLORES LOPEZ NUNEZ is at liberty upon her own recognizance, and for further return to said writ hereby certify that the true cause of the detention of the aforesaid DOLORES LOPEZ NUNEZ is the authority contained in a certain warrant of deportation duly and regularly issued on June 29, 1936, by an Assistant to the Secretary of Labor of the United States of America, after a hearing duly and regularly held before an immigrant inspector of the United States. A copy of the said warrant of deportation is attached hereto and made a part hereof.

Harry B. Blee

HARRY B. BLEE

Ass't. District Director

Immigration & Naturalization Service

Los Angeles, California

Respondent

WARRANT – – – DEPORTATION OF ALIEN
UNITED STATES OF AMERICA

Department of Labor
Washington

No. 9097/6492

No. 55895/642

TO: DISTRICT DIRECTOR OF IMMIGRATION
AND NATURALIZATION, Los Angeles, Calif.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

WHEREAS, from proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien

DOLORES LOPEZ de NUNEZ,

who entered the United States at San Ysidro, Calif., on – – – the 22nd day of Aug., 1934, is subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to wit: The act of 1917, in that she was a person likely to become a public

charge at the time of entry; and that she became a public charge within five years after *he* entry into the United States from causes not affirmatively shown to have arisen subsequent thereto.

I, the undersigned officer of the United States, by virtue of the power and authority vested in me by and under the laws of the United States, do hereby command you to deport the said alien to – Mexico – , at the expense of the appropriation “Salaries and Expenses, Immigration and Naturalization Service, 1936”, including the expenses of an attendant, if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 29th day of June, 1936.

/s/ TURNER W. BATTLE

Ass't. to the Secretary of Labor

[Endorsed]: Received copy of the within Return to Writ of Habeas Corpus this day of March, 1937.
D. C. Marcus Attorney for Petitioner Filed Mar 15
1937 R. S. Zimmerman, Clerk By B. B. Hansen Deputy
Clerk.

At a stated term, to-wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of March in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable: PAUL J. McCORMICK District Judge.

In the Matter of)	
Dolores Lopez Nunez,	)	No. 13092-M-Crim.
on Habeas Corpus.)	

This cause coming on for hearing on return to writ; David C. Marcus, Esq., appearing for the petitioner; Leo Silverstein, Esq., Assistant U. S. Attorney, appearing for the Government; David C. Marcus, Esq., moves that the petition be considered traverse to Return including Immigration Record to be filed in ten days, and it is so ordered.

At a stated term, to wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 28th day of April in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable Paul J. McCormick, District Judge.

In the Matter of)	
)	
DOLORES LOPEZ NUNEZ	)	No. 13092-M
)	
On Habeas Corpus.)	

Upon the record submitted in this habeas corpus proceeding, it appears that the alien petitioner has been, without due process of law and as the result of an abuse of discretion by the immigration authorities of the United States, ordered deported to Mexico. It is therefore ordered that the petitioner Dolores Lopez Nunez be discharged from further custody or restraint of officers or agents of the United States, and that she be not deported at this time. See memorandum opinion filed herein this day.

Exceptions allowed respondent.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION
CENTRAL DIVISION

In the Matter of	)	No. 13092-M
	)	PETITION FOR
DOLORES LOPEZ NUNEZ	)	APPEAL AND
	)	ORDER ALLOW-
On Habeas Corpus	)	ING APPEAL

WALTER E. CARR, District Director, U. S. Immigration and Naturalization Service, Department of Labor, for the Los Angeles District No. 20, Petitioner and Appellant here, deeming himself aggrieved by the judgment and order entered herein on April 28, 1937, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit and prays that a transcript of record of the proceedings and papers on which said order and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

Dated: July 22, 1937.

PEIRSON M. HALL,
United States Attorney,
By Leo V. Silverstein
Assistant United States Attorney.

ORDER

Now, to-wit: on the 22nd day of July, 1937

IT IS ORDERED that the above petition for appeal be granted and that the said appeal be allowed as prayed for.

Paul J. McCormick

United States District Judge.

[Endorsed]: Received copy of the within petition for appeal and order allowing appeal this 22 day of July 1937 David C Marcus S. Stoner Attorney for Petitioner & Appellee. Filed Jul 22 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENTS OF ERROR.

COMES NOW Walter E. Carr, District Director, U. S. Immigration and Naturalization Service, Department of Labor, for the Los Angeles District No. 20, and presents the following assignments of error in the decision of the District Court for the Southern District of California, as follows:

1. The Court erred in discharging said Dolores Lopez Nunez from the custody of Appellant.

2. The Court erred in holding and deciding that the deportation of Dolores Lopez Nunez would be violative of due process of law and contrary to the public policy of the United States.

3. The Court erred in holding and deciding that, as a matter of law, sound public policy precluded the deportation of said Dolores Lopez Nunez.

4. After finding that warrant of deportation issued by the Secretary was warranted from the facts and that said warrant of deportation was fairly issued, the Court erred in discharging said Dolores Lopez Nunez from the custody of Appellant.

Dated: This 22nd day of July, 1937.

Peirson M. Hall

United States Attorney,

By Leo V. Silverstein

Assistant United States Attorney.

[Endorsed]: Received copy of the within Assignments of Error this 22 day of July 1937 David C Marcus S Stoner Attorney for Petitioner & Appellee Filed Jul 22 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION REGARDING ORIGINAL RECORDS AND FILES OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between Peirson M. Hall, United States Attorney for the Southern District of California, Central Division, and Leo V. Silverstein, Assistant United States Attorney for said district, attorneys for Walter E. Carr, Director of Immigration and Naturalization Service of the United States for the Los Angeles District, No. 20, appellant, and David C. Marcus, attorney for the appellee herein, that the original files and records of the Department of Labor, covering the deportation proceedings against the said appellee which were filed in the hearing in the above entitled case may be by the Clerk of this court sent up to the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, as part of the appellate record in order that said original immigration files may be considered by the Circuit Court of Appeals for the Ninth Circuit in lieu of certified copy of said records and files and that said original records may be transmitted as part of said appellate record.

DATED: August 2, 1937.

Peirson M. Hall

PEIRSON M. HALL

United States Attorney

Leo V. Silverstein

LEO V. SILVERSTEIN

Assistant United States Attorney

David C. Marcus

DAVID C. MARCUS

Attorney for Dolores Lopez Nunez

[Endorsed]: Filed Aug. 3 1937 R. S. Zimmerman,
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS

ON STIPULATION OF COUNSEL, it is by the court ORDERED that the original records in the United States Immigration Office, filed herein on the hearing of the return of the said appellant Walter E. Carr, District Director of the United States Immigration and Naturalization Service for the Los Angeles District, No. 20, to the writ of habeas corpus herein, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits, in lieu of a certified copy of said records and files and that the same may not be printed.

DATED: August 3, 1937.

Leon R Yankwich
United States District Judge.

[Endorsed]: Filed Aug 3-1937 R. S. Zimmerman,
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED
COURT:

You will please prepare and duly authenticate the transcript and the following portions of the record in the above entitled case for appeal of said appellant heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint and Petition for Writ of Habeas Corpus.
2. Order granting Writ of Habeas Corpus and fixing bond pending hearing thereon.
3. Writ of Habeas Corpus.
4. Return to Writ of Habeas Corpus.
5. Order discharging said Dolores Lopez Nunez from custody of said Walter E. Carr as Director of Immigration.
6. Petition for Appeal.
7. Order allowing Appeal.
8. Assignment of Error.

9. Stipulation that original files and records in the Department of Labor be sent to the Clerk of the Circuit Court as part of the appellate record.

10. Order for transmission of original exhibits.

11. Citation.

12. This Praecipe.

13. Record showing traverse to return on writ of habeas corpus.

DATED: August 2, 1937.

Peirson M. Hall

PEIRSON M. HALL

United States Attorney

Leo V. Silverstein

LEO V. SILVERSTEIN

Assistant United States Attorney

[Endorsed]: Received copy of the within this 1st day of Aug 1937 D C Marcus Filed Aug 3 1937 R. S. Zimmerman, Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 30 pages, numbered from 1 to 30 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for writ of Habeas Corpus; order granting writ of Habeas Corpus; return to writ of Habeas Corpus; order of March 15, 1937; order of April 28, 1937; petition for appeal and order allowing appeal; assignment of errors; stipulation regarding original records and files of department of labor; order for transmission of original exhibits, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of August, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,

Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Petition of
DOLORES LOPEZ NUNEZ,
For a Writ of Habeas Corpus.

WALTER E. CARR, District Director of Immigration
of the United States for the Los Angeles District,
No. 20,

Appellant,

vs.

DOLORES LOPEZ NUNEZ,

Appellee.

Supplemental Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

SEP - 2 1937

PAUL P. O'BRIEN,
CLERK

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of the Petition of
DOLORES LOPEZ NUNEZ,
For a Writ of Habeas Corpus.

WALTER E. CARR, District Director of Immigration
of the United States for the Los Angeles District,
No. 20,

Appellant,

vs.

DOLORES LOPEZ NUNEZ,

Appellee.

Supplemental Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

IN THE MATTER OF THE PE-)
TITION OF DOLORES LOPEZ)
NUNEZ, FOR A WRIT OF)
HABEAS CORPUS)

_____)
)

WALTER E. CARR, District Di-)
rector of Immigration of the United)
States for the Los Angeles District,)
No. 20,)

No. 8642

STIPULATION

Appellant,)

vs)

DOLORES LOPEZ NUNEZ,)

Appellee.)

STIPULATION

IS IS HEREBY STIPULATED that Memorandum
Opinion filed the 28th day of April, 1937, in the above en-
titled matter, shall be part of the Transcript on Appeal in
the within matter.

David C. Marcus
Attorney for Appellee
BEN HARRISON,
U S Attorney
Leo V. Silverstein,
Assistant United States Attorney
Attorneys for Appellant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of	)	No. 13092-M
	)	MEMORANDUM
DOLORES LOPEZ NUNEZ	)	OPINION ON
	)	HABEAS CORPUS
On Habeas Corpus	)	PROCEEDING

McCORMICK, District Judge:

In my opinion, the deportation of this alien Mexican woman at this time would be violative of due process of law and contrary to the public policy of the United States as declared in decisions of the Supreme Court. See Pierce v. Society of Sisters, 268 U. S. 534; Meyer v. Nebraska, 262 U. S. 399.

The file record of the Immigration Service shows that the alien lawfully entered the United States with her mother when about twelve years of age. She is now approximately twenty-eight, and has been a continuous resident of the United States since her said first entry. She lawfully married at Los Angeles, California, on July 20, 1924, and there were four children born of such marriage, three of whom are now living with their mother, the alien, in this country. Until her husband's fatal illness in 1931, the family was sufficiently supported by him, but since 1932 the alien and her children have been necessarily maintained at public expense. She has been ill during much of the time since her husband's death, and she is now an arrested tubercular and is otherwise in need of medical

and surgical attention, and is unable to work or earn a living for herself or her children. Her three children are natives of the United States and are of the tender ages of eight, seven and five years respectively.

Upon her aforesaid entry on December 8, 1922, the alien was given an identification card which she still has in her possession and which she has lawfully exhibited and used several times for temporary visits to Tia Juana, Mexico.

The last time she left the United States on one of such short trips was on August 3, 1934. She returned through the port of San Ysidro, California, within a few days. She was arrested about June 13, 1935, by the immigration officers, and after due hearings was found to be (1) "A person likely to become a public charge at the time of entry"; and (2) "Becoming a public charge within five years after entry into the United States from causes not affirmatively shown to have arisen subsequent thereto"; and by the Secretary of Labor has been ordered to be deported under Section 19 of the Immigration Act of 1917, 8 USCA Section 155. There is no claim or evidence that the alien is subject to deportation for anything except that she is destitute and has been or continues to be a public charge within the immigration laws of the United States. Her character or activities have not been questioned and are not in issue.

There is authority that the re-entry permit of the alien issued to her in 1922 cannot be invoked to exempt her from the ban of immigration laws or from exclusion because likely to become a public charge or becoming such in relation to her last entry in August, 1934.

Canciamilla v. Haff (C. C. A. 9) 64 F. (2d) 875;
Koga v. Berkshire, (C. C. A. 9) 75 F. (2d) 820; United
States ex rel v. Fogarty (D. C., N. Y.) 13 Fed. Supp. 403.

The record clearly shows facts under these decisions that warranted the findings of the immigration authorities concerning the poverty and dependence of the alien upon public bounty, and if such matters were the sole elements to be considered in this habeas corpus proceeding, the Secretary's warrant of deportation would be regarded as having been fairly issued and should be executed. But the status of this alien in this country is naturally and inextricably tied to the lives and welfare of her three minor American born children who cannot be legally deported or excluded from the United States.

If the mother is deported, the children should and probably must go with her to Mexico. The record shows that it is the children who are the major recipients of the public benefactions, and if the deportation of this alien mother is sought to be justified upon the claim of public economy, this result will be attained only slightly. There is no one in the United States able to support the children. They must continue to be public charges in the United States or be forced to go to Mexico with their mother. The first eventuality is safer and more humane than the last. Sound public policy and the welfare of the American born children of the alien preclude as a matter of law her deportation at this time.

Dated this April 28, 1937.

[Endorsed]: Filed Apr 28 - 1937 R. S. Zimmerman,
Clerk, By B. B. Hansen, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 4 pages, numbered from 1 to 4 inclusive, to be the Supplemental Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the stipulation and memorandum opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of September, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of

DOLORES LOPEZ NUNEZ,

On Habeas Corpus.

WALTER E. CARR, District Director, U. S. Immigration
and Naturalization Service, Department of Labor, for
Los Angeles District No. 20,

Appellant,

vs.

DOLORES LOPEZ NUNEZ,

Appellee.

BRIEF FOR APPELLANT, WALTER E. CARR

BEN HARRISON,

United States Attorney,

LEO V. SILVERSTEIN,

Assistant United States Attorney.

376 Pacific Electric Bldg., Los Angeles,

Attorneys for Appellant.

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No. 8642.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of

DOLORES LOPEZ NUNEZ,

On Habeas Corpus.

WALTER E. CARR, District Director, U. S. Immigration
and Naturalization Service, Department of Labor, for
Los Angeles District No. 20,

Appellant,

vs.

DOLORES LOPEZ NUNEZ,

Appellee.

BRIEF FOR APPELLANT, WALTER E. CARR

Opening Statement.

This appeal is taken by the Government from the order of the District Court for the Southern District of California, Central Division, granting a Writ of Habeas Corpus and discharging the alien Dolores Lopez Nunez from the custody of the United States Immigration and Naturalization Service [Tr. of Record, p. 23]. The proceeding arose in the court below by the filing by Dolores Lopez Nunez, appellee herein, of a petition for a Writ of Habeas Corpus praying for her discharge from the cus-

tody of Walter E. Carr, District Director of Immigration and Naturalization Service for the Los Angeles District, the respondent in the court below and the appellant herein.

The certified Department of Labor file, containing the record of the deportation proceedings against Dolores Lopez Nunez has been filed with the clerk of this Court pursuant to stipulation between the parties [Tr. of Record, p. 27]. This file will hereinafter be referred to as the "Immigration Record".

The printed transcript of the proceedings in the District Court will be referred to as "Tr. of Record".

Statement of Facts of the Case.

Dolores Lopez Nunez, petitioner below and appellee herein, is twenty-nine years old, an alien, a citizen of Mexico of the Mexican race. It seems that she first arrived in the United States in 1915 or 1916 and remained therein until 1919 or 1920, when she returned to Mexico, reentering the United States on December 8, 1922. From that date, up to the 22nd day of August, 1934, she made several trips to Mexico. On August 22, 1934 she entered the United States through the port of San Ysidro, California, after a short visit to Mexico. That is the date of her last entry into the United States. Since 1932 she has been entirely supported at public expense.

The Immigration Record shows that from October, 1932 until May, 1934 she received continuous aid from the State and County Welfare authorities in the sum of \$40.00 per month, and that since May, 1934, when one of her children was killed, she received \$32.25 per month from the relief authorities. In addition, she has received medical treatment in the Los Angeles County General

Hospital, where she was examined as an out-patient on July 29, 1931; was an in-patient from December 7th to the 16th, 1931; was an out-patient from December 17, 1932 to June 21, 1933; from September 26, 1933 to January 18, 1934 and from June 27, 1934 to October, 1934, all at public expense. Since the latter date the Immigration Record shows she has called more or less regularly at the Los Angeles County General Hospital for examination and treatment. She was a charge upon the public before her departure to Mexico in 1934 and continuously since her reentry on August 22, 1934.

On March 26, 1935 she was examined by an officer of the Immigration and Naturalization Service in regard to her right to be and remain in the United States. Transcript of her statement together with "Medical Certificate", Form 541 ("Proof that Alien Has Become a Public Charge" and "Clinical History"), Exhibit "B" and Exhibits "C" and "D", relating to appellee's admission to the United States on December 12, 1922 and on August 22, 1934 [see Immigration Record], were forwarded to the Department of Labor, Washington, D. C., and on the 25th day of May, 1935 the Assistant to the Secretary of Labor caused his warrant to be issued directing that appellee be taken into custody and given a hearing to show cause why she should not be deported from the United States. Appellee was taken into custody under said warrant and notified of the charges and the nature of the proceedings and thereupon released upon her own recognizance and she is still at large. Hearings were then

granted appellee under said warrant and she was at all times represented by counsel of her own selection. At the request of her counsel the hearing was continued from time to time and finally, on the 4th day of March, 1936, it was concluded and the complete transcript of the record was forwarded to the Department at Washington, D. C. After a careful review of all the evidence of record by a Board of Review, the Assistant to the Secretary of Labor, on June 29, 1936, issued his warrant directing the deportation of the appellee to Mexico, having found from the evidence that she was subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto in that

- (1) "She was a person likely to become a public charge at the time of entry", to-wit, August 22, 1934; and
- (2) "She became a public charge within five years after her entry into the United States from causes not affirmatively shown to have arisen subsequent thereto."

After the issuance of the warrant of deportation, the Department reconsidered its decision at the request of appellee's counsel and on the 30th day of July, 1936 it affirmed its previous decision. Appellant was preparing to execute the warrant of deportation when the Writ of Habeas Corpus was issued in the lower court. After a hearing, the court sustained the writ and discharged appellee from the custody of the Immigration and Naturalization Service.

Specifications of Error.

The specifications of error relied upon by appellant are as follows:

Specification I: The Court erred in granting the Writ of Habeas Corpus and discharging said Dolores Lopez Nunez from the custody of the Immigration and Naturalization Service [Assignments 1 and 4, Tr. of Record, p. 26].

Specification II: The Court erred in holding and deciding that the deportation of said Dolores Lopez Nunez was violative of due process of law and contrary to the public policy of the United States [Assignments 2 and 3, Tr. of Record, p. 26].

Specification III: The Court erred in holding and deciding that the said Dolores Lopez Nunez was ordered deported as a result of an abuse of discretion [Assignment 2, Tr. of Record, p. 26].

Issues of the Case.

One point of law, and only one, is involved in the determination of this appeal, namely:

WAS THE ORDER OF DEPORTATION VIOLATIVE OF DUE PROCESS AND A RESULT OF AN ABUSE OF DISCRETION?

ARGUMENT.

The Court below found and held that under the facts and the law the immigration authorities were justified in finding that the appellee was subject to deportation on the grounds specified in the deportation warrant [Supp. Tr. of Record, p. 4]. Having so found and held, it is the contention of appellant that there was no ground for judicial intervention and that the lower Court erred in granting the writ and discharging appellee.

The facts established in the deportation proceedings were sufficient to bring the appellee within the classes of aliens whose deportation is directed by law.

Under the provisions of the Immigration Act of February 5, 1917 (8 U. S. C. A. 155), deportation is directed of any alien who at the time of entry was a member of one or more of the classes excluded by law. Among the classes of aliens excluded from admission into the United States by section 3 of the same Act (8 U. S. C. A. 136), are "persons likely to become a public charge". See:

Gegiow v. Uhl, 239 U. S. 3;

Lam Fung Yen v. Frick, 233 Fed. 393 (cert. denied, 242 U. S. 642).

The Immigration Act also provides for the deportation of an alien who, within five years after entry, becomes a public charge from "causes not affirmatively shown to have arisen subsequent to landing". Section 19 of the Act (8 U. S. C. A. 155), provides:

"That at any time within five years after entry any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * any alien who within five years after entry becomes

*a public charge from causes not affirmatively shown to have arisen subsequent to landing; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported; * * *. In every case where any person is ordered deported from the United States under the provisions of this act, or any law or treaty, the decision of the Secretary of Labor shall be final.” (Italics ours.)*

Appellee’s entry on August 22, 1934 is the entry upon which the deportation order is based and the one which comes within the scope of the law. Both grounds upon which the order of deportation was based are conclusively established by the evidence of record in the Immigration Record, and it was so found and held by the Court below. But the lower Court, in addition, found and held [Supp. Tr. of Record, p. 2], that

“the deportation of this Mexican woman at this time would be violative of due process of law and contrary to the public policy of the United States as declared in decisions of the Supreme Court. See *Pierce v. Society of Sisters*, 268 U. S. 534; *Meyer v. Nebraska*, 262 U. S. 399.”

Was the Order of Deportation Issued as a Result of an Abuse of Discretion?

Appellant contends that it was not and that the Court erred in so holding.

The Immigration Act of February 5, 1917 (8 U. S. C. A. 136), as did the prior Act of February 20, 1907 (34 U. S. Stat. at L., p. 899, c. 1134), in express terms provides for the deportation of aliens likely to become public charges at the time of entry. The Immigration

Act of 1917 (8 U. S. C. A. 155), also provides that in every case where any person is ordered deported from the United States under the provisions of that Act, the decision of the Secretary of Labor shall be final. The Department of Labor, as well as the courts, are obligated to carry out the will of Congress as expressed in the Immigration Act. It is not within the province of the Department to exercise its own notion as to the policy or justice of the legislation. Congress has given no discretion to the Department to withhold the deportation of any alien who the law directs should be deported. Having no discretion to exercise after it has found from the facts that an alien is, under the law, subject to deportation, how can it be said that the Secretary abused his discretion in ordering this alien deported. The cases are legion holding that the action of a duly authorized administrative or executive officer in directing the deportation of an alien, after a fair hearing, is final and conclusive if there is evidence to support the decision and there has not been an application of an erroneous rule of law, and the courts will not disturb such decision:

Akiro Ono v. U. S. (C. C. A. 9), 267 Fed. 359;

Ex parte Saadi (C. C. A. 9), 26 Fed. (2d) 458
(cert. denied, 278 U. S. 616);

Kumaki Koga v. Berkshire (C. C. A. 9), 75 Fed.
(2d) 820 (cert. denied, 295 U. S. 757).

The Court below did not find, nor hold, that appellee was denied a fair hearing or that there was insufficient evidence to support the decision or that there was an erroneous application of law. But it held that the deportation of this alien would be violative of due process of

law and as a result of an abuse of discretion [Tr. of Record, p. 23].

It is submitted that the finding of the lower Court that under the facts and law the immigration authorities were justified in issuing the warrant of deportation is inconsistent with the finding and holding that the alien's deportation would be violative of due process of law [Supp. Tr. of Record, p. 4].

Is the Deportation of Appellee Violative of Due Process of Law?

The power to exclude and deport aliens from the United States is a political power vested in the political departments of the Government to be exercised in accordance with the acts of Congress by the executive branch of the Government. Congress has committed the enforcement of the immigration laws to the Department of Labor. These principles are firmly established by the decisions of this Circuit Court and the Supreme Court of the United States:

Akido Ono v. U. S. supra;

Ex Parte Saadi, supra;

Kumaki Koga v. Berkshire, supra;

Bilokumsky v. Tod, 263 U. S., 149, 44 S. Ct. 54;

Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492;

United States ex rel. Turner v. Williams, 194 U. S. 279, 24 S. Ct. 719;

Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016.

And, except where there has been a denial of a fair hearing, or where a finding was not supported by the evidence, or where there has been an erroneous application of a rule of law, the findings of the immigration authorities are conclusive on the courts and the courts will not interfere:

Kumaki Koga v. Berkshire, supra;

Kenmotsu v. Nagle (C. C. A. 9), 44 Fed. (2d) 953,
(Cert denied, 295 U. S. 757).

In the case at bar the alien was not denied a fair hearing. The finding of the immigration authorities was supported by the evidence and there was no erroneous application of a rule of law and the lower court so found. It was held in:

*Murray's Lessee v. Hoboken Land & Improvement
ment Co.*, 59 U. S. 272, 280, 281, 283,

that:

“Though ‘due process of law’ generally implies and includes actor, *reus*, *judex*, regular allegations, opportunity to answer and a trial according to some course of judicial proceedings, yet this is not universally true;”

and that:

“Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both.”

It was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers—and in case of default, their sureties—to pay such balances of the public money as might be in their hands. It has long been settled that the power to

exclude or expel aliens belongs to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to remain in this country depended, is "due process of law" and no other tribunal, unless expressly authorized to do so, is at liberty to re-examine the evidence on which he acts. See:

Fong Yeu Ting v. U. S., *supra*;

Nishimura Ekiu v. United States, 142 U. S. 651;

Mahler v. Eby, 264 U. S. 32.

In the case at bar there was no hasty, arbitrary or unfair action on the part of any official, or any abuse of discretion. The procedure prescribed by the rules of the Department were followed in every respect and the legality of that prescribed is not questioned. The hearing was conducted orally and transcribed. The alien was present and represented by counsel. She was given ample time in which to present evidence, argument and a brief. Under these circumstances how can the holding of the lower court that the deportation of this Mexican alien is violative of due process of law be upheld?

The hearings under the warrant were properly conducted with regard to the rights of appellee and the evidence is sufficient to establish that appellee is subject to deportation. Certainly under the rule of the *Bilokumsky v. Tod* case, *supra*, the proceedings were in accordance with due process of law.

Is the Deportation of Appellee Contrary to the Public Policy of the United States?

The lower court held that the deportation of this Mexican alien is contrary to the public policy of the United States [Supp. Tr. of Record, p. 2]. Appellant contends that it is not and that the lower court erred in so holding.

The United States has plenary powers to admit, exclude, or deport aliens, absolutely or upon any condition it cares to make. Such right is inherent in sovereignty and inalienable; it may be exercised in war and peace, and is essential to the safety, independence, and welfare of its citizens. These principles are so firmly established that they are no longer seriously questioned. They have been repeatedly asserted by the Supreme Court of the United States:

Bilokumsky v. Tod, supra;

Ng Fung Ho v. White, supra;

Turner v. Williams, 194 U. S. 279;

Fong Yue Ting v. United States, supra.

Congress, in express terms, has provided for the deportation of aliens "likely to become public charges," or who have "become public charges within five years after entry from causes not affirmatively shown to have arisen subsequent thereto" (8 U. S. C. A., Secs. 136 and 155). The deportation of such aliens is mandatory. The statute makes no exception and the Department of Labor, in which Congress has reposed the power to enforce and execute the laws, *has no discretion*. It is bound to carry out the will of Congress. "The judicial department can not properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in

the exercise of the powers confided to it by the Constitution over the subject * * *” of the exclusion or expulsion of aliens:

Nishimura Ekin v. United States, supra;

Ng Fung Ho v. White, supra;

Bilokumsky v. Tod, supra;

Turner v. Williams, supra;

Li Sing v. United States, 180 U. S. 486.

In the case last cited, the Supreme Court used this pertinent language:

“* * * We can but repeat what was said in similar appeals in the case of *Fong Yue Ting v. United States* (149 U. S. 698), above cited: ‘*The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political department of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or justice of the measures enacted by Congress in the exercise of the powers confided to it, by the constitution over this subject*’.” (Italics ours.)

For many years it has been the express policy of the United States to exclude and expel aliens likely to become charges upon the public. The reason therefor is obvious and need not be discussed here. As early as 1882 Congress provided for the exclusion of aliens likely to become public charges (Act of August 3, 1882, Sec. 2 (22 Stat. 214)), and by the Act of October 19, 1888 (25 Stat. 566), it authorized the Secretary of the Treasury to take into custody and deport, within a period of one year after entry, any alien who had been allowed to land contrary

to the prohibition of the law. The exclusion and deportation of such aliens was reenacted in the Act of February 20, 1907 (34 Stat. 898), section 20 of which provided:

“That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall upon the warrant of the Secretary of Labor be taken into custody and deported * * *.”

In arriving at its decision the lower court considered the fact that appellee has three minor American-born children. There is a hardship involved in every deportation case, but that is a matter for the legislative branch of the Government to consider, for, as stated by this Honorable Court in the case of:

Kenmotsu v. Nagle, supra:

“The right of the courts to review the action of the department having the authority to adjudge the facts extends only so far as to determine that the warrant of deportation was not arbitrarily issued, or issued as the result of an unfair hearing. *Tisi v. Tod*, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590; *Bilokumsky v. Tod*, Commissioner, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221.”

and where the alien is otherwise subject to deportation the Court may not consider the hardship necessarily involved in deporting him:

United States ex rel. Cerami v. Uhl (D. C., N. Y.),
9 Fed. Supp., 887 (Reversed on other grounds,
78 Fed. (2d) 698);

Ex Parte Garcia, 2 Fed. Supp. 966 (D. C. Tex.).

In the case last cited the alien involved was 26 years of age and had resided in this country since she was six months old. She was married and had one American-born child and a dependent mother; had never been to Mexico except for two months in 1913, and had no friends or close relatives there. It was alleged that her deportation would deprive her American-born child of the mother's care and that it would become a public charge. The Court, in considering these matters, said:

“* * * But under the law, what shall be done under such circumstances is not for the court, but exclusively for the Secretary of Labor, to determine. His determination is final, and not subject to review by the courts in a habeas corpus proceeding. Whether petitioner will present the matter further to the Secretary of Labor is for her to decide.”

And, in:

Cerami v. Uhl, supra,

the Court said:

“The court may not consider the hardship to the alien necessarily involved in deporting him where he is otherwise subject to deportation. The court may not consider the fact that the alien whose deportation is directed has resided in this country for many years, that other members of his family were born here, and that deportation will be tantamount to exile from a country in which the alien has always lived to a country in which he will be a stranger.”

And this Honorable Court, in the case of:

Ex Parte Vilarino, 50 Fed. (2d) 582,

affirmed the decision of the lower court (47 Fed. (2d) 912), remanding the alien to the custody of this service for deportation, even though it was shown that Vilarino was married and had *eleven children*, all born in this country.

Appellant is not unmindful of the situation in which the appellee here finds herself, but the law is clear and both the Department of Labor and the courts are bound by the will of Congress. Also, as said by the Supreme Court in the case of:

Li Sing v. United States, supra:

“* * * The order of deportation is not punishment for a crime. It is not a banishment, in the sense in which that word is often applied to the exclusion of a citizen of a country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper department, has determined that his continuing to reside here shall depend. *He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the constitution securing the right of trial by jury, and prohibiting searches and seizures, and cruel and unusual punishments, have no application.*” (Italics ours.)

In:

Costanzo v. Tillinghast, 287 U. S. 341; 53 S. Ct. 152; 77 L. Ed. 530,

the Supreme Court stated:

“The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the Department charged with its enforcement, creates a presumption in favor of administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.”

The Department of Labor has uniformly insisted that where the facts bring any alien within the provision of the law which directs deportation it has no discretion but to carry out the intent and will of Congress. It will take but a moment's reflection to determine that if the United States is barred from giving full force and effect to the provision of the law which directs the deportation of the alien involved in the case at bar, it would practically nullify the deportation provision of the immigration laws in those cases where some member of an alien's family is born in this country. Thus the practice of the Department for over half a century would have to be abandoned and our Government placed in a position of impotence to afford relief and protection to the great body of our citizenship for whose welfare and protection the immigration laws were enacted.

Conclusion.

It having been determined from the facts that Dolores Lopez Nunez is subject to deportation under the law; that she was given a fair hearing; that there was no erroneous application of the law, and that the warrant of deportation was not arbitrarily issued, appellant respectfully contends that the Court below erred in granting the Writ of Habeas Corpus and ordering the appellee discharged from the custody of the Immigration and Naturalization Service.

Respectfully submitted,

BEN HARRISON,

United States Attorney,

LEO V. SILVERSTEIN,

Assistant United States Attorney.

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED
DEC - 4 1937

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEONG CHONG WING,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Mr. JOHN F. GARVIN,
Attorney for Appellant,
1122 Northern Life Tower,
Seattle, Washington.

Messrs. J. CHARLES DENNIS and
F. A. PELLEGRINI,
Attorneys for Appellee,
222 Post Office Building,
Seattle, Washington. [1*]

*Page numbering appearing at the foot of page of original **certified**
Transcript of Record.

United States District Court, Western District of
Washington, Northern Division

November Term, 1936

No. 44282

UNITED STATES OF AMERICA,

Plaintiff,

LEONG CHONG WING,

alias Lew Ching Wing,

“ Yue Sing,

“ Yoe Sing,

“ Yoe Sing Wing,

LYLE G. GRAY,

Defendants.

INDICTMENT

United States of America,
Western District of Washington,
Northern Division—ss.

Vio. Sec. 174, Title 21, U. S. C. A. and Sec.
1593 (b), Title 19, U. S. C. A.

The grand jurors of the United States of America
being duly selected, impaneled, sworn, and charged
to inquire within and for the Northern Division of
the Western District of Washington, upon their
oaths present: [2]

COUNT I.

(174-21)

That Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, and Lyle G. Gray, hereinafter called the defendants, to wit: On or about the twelfth day of February, 1937, at the City of Seattle, County of King, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Honorable Court, then and there being, did then and there violate the Act of February 9, 1909, as amended by the Act of May 26, 1922, in that they, the said defendants, did then and there willfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain derivative and preparation of opium, to wit: One (1) ounce of opium prepared for smoking, which said preparation of opium, as the defendant then and there well knew had been imported into the United States contrary to law.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such case made and provided. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

(1593 (b)-19)

(Dismissed 8/5/37. J. C. B.)

That Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, and Lyle G. Gray, whose true and full names are to the Grand Jurors unknown, and each of them, on or about the twelfth day of February, in the year of our Lord one thousand nine hundred thirty-seven, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the Customs Collection District of Washington and within the jurisdiction of this Court, then and there being, did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive, conceal, buy, sell, and facilitate the transportation and concealment of certain dutiable merchandise, to-wit: One (1) ounce of opium prepared for smoking, a more particular description of the said merchandise being to the Grand Jurors unknown, which said merchandise had theretofore been imported and brought into the United States from a foreign country to the Grand Jurors unknown, contrary to law, that is to say, without submission for inspection by any officer of the Customs Service of the United States, and without reporting the entry of said merchandise to any officer of the Customs Service of the United States and without the payment of any duty thereon, all of which they, the said Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing,

alias Yoe Sing Wing, and Lyle G. Gray, then and there well knew; contrary to the form of the statute in such case made and provided, and against the peace and [4] dignity of the United States of America.

J. CHARLES DENNIS

United States Attorney

F. A. PELLEGRINI

Assistant United States Attorney

A true bill.

GLEN McLEOD,

Foreman.

J. CHARLES DENNIS.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court Feb. 26, 1937. Edgar M. Lakin, Clerk. By S. E. Leitch, Deputy. [5]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA

Now on this 15th day of March, 1937, Gerald D. Hile, Assistant United States District Attorney appearing for the plaintiff, the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, accompanied by his counsel John F. Garvin, Esq., comes into open court for arraignment and answers that his true name is Leong Chong Wing. The defendant waives the formal reading of the indictment

and now enters a plea of not guilty as to both counts of the indictment, subject to motions and other pleadings that may be filed.

Journal No. 24, page 540. [6]

[Title of Court and Cause.]

AFFIDAVIT

United States of America,
State of Washington,
County of King—ss.

Leong Chong Wing, being first duly sworn, upon his oath deposes and says: That on the 12th day of February, 1937, at the hour of about two o'clock p. m. he was riding in his automobile. That certain agents and officers of the United States, without any warrant for his arrest or warrant to search his car, arrested affiant and searched his car; that your affiant had committed no crime in the presence of said officers and that they had no reasonable ground to suspect that affiant had committed a felony; that affiant was not guilty of any breach of the public peace; that said officers searched your affiant's car and took therefrom a certain quantity of narcotic drugs; that your affiant has grounds to believe and does believe that said narcotics will be used against him in the trial of said cause; that there was no legal authority whatsoever for said search. Further affiant sayeth not.

LEONG CHONG WING

Subscribed and sworn to before me this 10th day of March, 1937.

[Seal] WARREN HARDY,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Mar. 15, 1937. [7]

[Clerk's Note: Affidavits of David Tow, Lonnie McIntosh, M. L. Hanks, M. W. Pevonak, G. W. Harlow, G. C. Polite, Leong Chong Wing, and Lyle G. Gray are here omitted as same are set forth in the printed record as follows: David Tow p. 56, Lonnie McIntosh p. 54, M. L. Hanks p. 51, M. W. Pevonak p. 47, G. W. Harlow pp. 44 and 53, G. C. Polite pp. 52 and 58, Leong Chong Wing pp. 42 and 62, Lyle G. Gray p. 64.]

[Title of Court and Cause.]

MOTION TO STRIKE

Comes now the defendant and moves the Court to strike all hearsay portions of the affidavits of Federal customs agents and narcotic agents filed herein controverting the motion and affidavits to suppress.

JOHN F. GARVIN

Attorney for Defendants

[Endorsed]: Filed Mar. 26, 1937. [26]

[Title of Court and Cause.]

DEMURRER AND MOTIONS HEARD
AND OVERRULED

Now on this 26th day of March, 1937, F. A. Pellegrini, Assistant United States District Attorney, appearing for the plaintiff, and John F. Garvin, Esq., appearing for the defendant, this cause comes on for hearing on Demurrer to Indictment; Motion to Quash Indictment; Motion to suppress evidence; Motion to elect; Motion to strike alias names from indictment; Motion to make Count II of the Indictment more definite and certain; Oral motion to strike conclusions of law in plaintiff's controverting affidavits on motion to suppress.

Arguments of counsel are heard on the demurrer and each and all of said motions. The demurrer is overruled, and each and every of the motions is denied, and an exception allowed defendant to each and every of said rulings of the Court.

Journal No. 24, page 568. [32]

[Title of Court and Cause.]

TRIAL

EXCERPT SHOWING DISMISSAL OF COUNT
II OF INDICTMENT

Now on this 5th day of August, 1937, F. A. Pellegrini, Assistant United States District Attorney appearing for the plaintiff, John F. Garvin, Esq., appearing for the defendants, Leong Chong Wing and Lyle G. Gray, who are both present in court,

this cause is called for trial, both sides announcing they are ready. On oral motion of the United States District Attorney, Count II of the Indictment is dismissed. A jury is empanelled and sworn as follows: * * *

Journal No. 24, page 853. [33]

[Title of Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant Leong Chong Wing is guilty as charged in Count I of the Indictment herein; and

Further find the defendant Lyle G. Gray not guilty as charged in Count I of the Indictment, being by the Court instructed so to do.

J. McLAIN GIBBS

Foreman

[Endorsed]: Filed Aug. 5, 1937. [34]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant and moves the Court for an order granting a new trial herein upon the following grounds:

I.

Insufficiency of evidence to justify the verdict of the jury.

II.

Error of law occurring in the trial excepted to by the defendant.

III.

Denying defendant's Motion for Directed Verdict.

JOHN F. GARVIN

Attorney for Defendant

Received a copy of the within Motion for New Trial this 7th day of Aug. 1937.

J. CHARLES DENNIS

Attorney for Pltff.

[Endorsed]: Filed Aug. 7, 1937. [35]

[Title of Court and Cause.]

ORDER (DENYING NEW TRIAL AND
MOTION IN ARREST OF JUDGMENT)

Now on this 9th day of August, 1937, the defendant, Leong Chong Wing, comes into Court accompanied by his counsel, John F. Garvin, Esquire, for sentence on Count I of the Indictment. Defendant, Leong Chong Wing, submits motion for a new trial and oral motion in arrest of judgment. The Court rules denying all pending motions of said defendant and exceptions are allowed.

Done in open Court this 9th day of August, 1937.

JOHN C. BOWEN,

Judge.

Presented by

JOHN F. GARVIN.

[Endorsed]: Filed Aug. 9, 1937. [36]

United States District Court, Western District of
Washington, Northern Division

No. 44282

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONG CHONG WING, et al.,

Defendants.

JUDGMENT AND SENTENCE.

Comes now on this 9th day of August, 1937, the said defendant Leong Chong Wing into open Court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, it is

Considered, ordered and adjudged by the Court that the said defendant Leong Chong Wing is guilty as charged in Count I of the Indictment of a violation of Section 174, Title 21, U. S. C. A. (Receiving, concealing, buying and selling, and facilitating the transportation and concealment after importation of opium imported contrary to law), and that he be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment in the United States Penitentiary at McNeil Island, Washington, or in

such other like institution as he may by law designate for a period of two years, and that he pay a fine to the United States of America in the sum of five hundred dollars (\$500), and that civil execution issue therefor.

Done in open Court this 9th day of August, 1937.

JOHN C. BOWEN

United States District Judge

Presented by:

F. A. PELLEGRINI

Asst. United States Atty.

[Endorsed]: Filed Aug. 9, 1937. [37]

[Title of Court and Cause.]

NOTICE OF APPEAL

I.

Name and address of appellant: Leong Chong Wing, 3802 Dakota St., Seattle, Washington.

II.

Name and address of appellant's attorney: John F. Garvin, 1122 Northern Life Tower, Seattle, Washington.

III.

Offense: Violation of Section 174, Title 21, U. S. C. A. of the Penal Code of the United States.

IV.

Date of judgment: Aug. 9, 1937.

V.

Brief description of judgment or sentence: count one, confinement in the Federal Penitentiary at McNeils Island for a term of two years and a fine of \$500 to be recovered as a civil judgment.

VI.

Name of place where appellant is now confined, if not on bail: Appellant is now at liberty on bail.

I, the above named appellant hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above mentioned on the grounds set forth below.

LEONG CHONG WING

Appellant

Dated, August 9, 1937. [38]

Grounds of appeal:

I.

That there was no evidence nor was there any reasonable inference from the evidence to sustain the charges contained in Count I of the indictment and that the evidence was insufficient to justify the verdict of the jury against the defendant herein.

II.

Errors of law that occurred during the trial which were to the prejudice of the defendant and which were excepted to at the time by the defendant.

III.

Misconduct of the Assistant District Attorney, excepted to by the defendant.

IV.

The court erred in denying the defendant's challenge to the sufficiency of the evidence at the conclusion of the Government's case made on behalf of the defendant and excepted to by the defendant at the time.

V.

The court erred in refusing to sustain a challenge at the conclusion of all of the evidence which was made on behalf of the defendant and upon the ruling of the court duly excepted to.

VI.

The court erred in failing to sustain the defendant's motion to suppress the evidence herein to which exception was taken.

VII.

The court erred in admitting the Government's Exhibit One in evidence to which the defendant excepted.

VIII.

The court erred in failing or refusing to sustain the motion to suppress made during the progress of the trial, to which the defendant excepted. [39]

IX.

The court erred in refusing to grant a directed verdict herein, to which ruling defendant excepted.

X.

The court erred in refusing to grant a motion for a new trial herein, to which the defendant duly excepted.

JOHN F. GARVIN

Attorney for Leon Chong Wing

Received a copy of the within Notice of Appeal this 9th day of Aug., 1937.

J. CHARLES DENNIS

United States Attorney

[Endorsed]: Filed Aug. 9, 1937. [40]

[Title of Court and Cause.]

APPEAL BOND OF LEONG CHONG WING.

Know All Men By These Presents:

That we, Leong Chong Wing as principal, and Look Ham and Harry Woo, as surety, and each of us, are held and firmly bound unto the United States of America in the full and just sum of Thirty-five Hundred Dollars U. S. Government Bonds for which have been deposited with the Clerk to be paid to United States of America, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, and assignees entirely and severally by these presents.

Sealed below with our seals and dated this 9th day of August, 1937.

Whereas, on the 5th day of August, 1937, in the District Court of the United States for the Western District of Washington, Northern Division, in a cause pending in said Court between the United States of America as plaintiff and Leong Chong Wing as defendant, being numbered 44282 of the records of the office of the Clerk of said Court, a jury returned a verdict against the said Leong Chong Wing judging him guilty as charged in Count 1 of the Indictment in said cause, charging him with violation of Section 174, Title 21, U. S. C. A. of the Penal Code of the United States;

Whereas, formal judgment and sentence in said cause was duly postponed by the above entitled Court until August 9, 1937; and

Whereas, said Leong Chong Wing was thereafter on August 9, 1937, duly sentenced by the Court to the custody of the Attorney General of the United States, to be confined in U. S. Penitentiary, McNeill's Island, for two years and to pay to the United States a fine of \$500.00, and that formal judgment and sentence having been filed in the office of the Clerk of the above entitled Court against said Leong Chong Wing, and [41]

Whereas, said Leong Chong Wing, principal herein, desires to appeal from such judgment and sentence so rendered in the above cause against him to the United States Circuit Court of Appeals for the 9th Circuit, and

Whereas, said Leong Chong Wing, principal, intends diligently to pursue all steps in prosecuting his appeal from said judgment and sentence;

Now, Therefore, the condition of the above obligation and recognizance is such that if said Leong Chong Wing, principal herein, shall personally appear before the United States District Court for the Western District of Washington, Northern Division, in the City of Seattle, Washington, in said district, from time to time and from term to term thereafter as may be ordered by the Court, and then and there obey the judgment of said Court, and not depart from the jurisdiction of said Court without leave therefrom; and that this bond and recognizance is further conditioned that said Leong Chong Wing, principal, shall be and appear either in person or by attorney in United States Circuit Court of Appeals in the 9th Circuit at San Francisco, California, or such city as may be designated by said Court for hearing on said appeal, on such day or days as may be appointed for the hearing on said cause in the said Court and diligently prosecute his appeal and abide by and obey all orders made by the United States Circuit Court of Appeals in said cause, and shall surrender himself in execution of any judgment or sentence appealed from by said Leong Chong Wing, principal herein, from the District Court of the United States for the Western District of Washington, Northern Division, as the said United States Circuit Court of Appeals for the 9th Circuit may direct, if the judgment and sentence appealed from and against him be affirmed or the Writ of Errors on appeal be dismissed; and if he shall appear for trial in the District Court of

the United States for the Western District of Washington, Northern Division, on such day or days as may be appointed [42] for a retrial of said cause before said District Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be affirmed and/or reversed by the United States Circuit Court of Appeals for the 9th Circuit, and render himself in execution of the judgment herein, should said judgment and sentence be affirmed, then the above obligation to be void; otherwise to be and remain in full force, virtue and effect.

LEONG CHONG WING,
Principal.

LOOK HAM,
HARRY WOO,
Surety.

Approved this 9th day of August, 1937.

JOHN C. BOWEN,
District Judge.

Presented by:

JOHN F. GARVIN,
His Attorney.

O. K. as to form.

J. CHARLES DENNIS,
United States Attorney.
F. A. PELLEGRINI,
Assistant United States Attorney.

[Endorsed]: Filed Aug. 9, 1937. [43]

[Title of Court and Cause.]

ORDER.

It appearing to the undersigned trial judge that the appellant above named on the 9th day of August, 1937, filed with the Clerk of this Court a notice of appeal in the above entitled cause,

Now therefore, in pursuance of the Rules of Practice and Procedure in Criminal Cases adopted by the Supreme Court of the United States on May 7, 1934,

It is ordered that the above named appellant or his attorney, and the United States Attorney do appear before the undersigned judge on the 16th day of August, 1937, at ten o'clock A. M. at the City of Seattle, in the court room of said court, for such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings; and as to the time for the filing of an assignment of the errors of which the appellant complains if the record on appeal is to be without a bill of exceptions; as to the preparation and filing of the bill of exceptions and the settlement of the same by the undersigned trial judge, as to the contents of the transcript of record on said appeal and as to the time for the filing of said record with clerk's certificate in the United States Circuit Court of Appeals for the Ninth Circuit, and as to all other matters pertinent to said appeal.

It is further ordered that the clerk of this court do forthwith serve a certified copy of this notice by mail or personally on the appellant or his attorney and on the United States Attorney for this district.

Dated at Seattle, this 9th day of August 1, 1937.

JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed Aug. 9, 1937. [44]

[Title of Court and Cause.]

ORDER FIXING TIME FOR LODGING BILL
OF EXCEPTIONS.

This matter coming before the Court upon the citation heretofore issued to the respective parties and their attorneys on the 9th day of August, 1937, and both parties being represented by their respective counsel, and the Court having considered the matter in the premises, and after hearing testimony upon the same and it being fully advised with reference to the facts by the respective counsel, it is hereby,

Ordered, adjudged and decreed that Leong Chong Wing shall have up to and including the 7th day of October, 1937 in which to procure to be settled and to file, the Bill of Exceptions, and also to file his Assignment of Errors in his appeal now pending before the United States Circuit Court of Appeals for the Ninth Circuit, and it is further

Ordered, adjudged and decreed that the term of court in which said cause was tried be and hereby is extended to and including the 7th day of October, 1937, for the purposes herein expressed.

Done in Open Court this 7th day of September, 1937.

JOHN C. BOWEN,
Judge.

Presented by:

JOHN F. GARVIN,
Attorney for Appellant.

O. K. as to form:

F. A. PELLEGRINI,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 7, 1937. [45]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the District Court of the United States for the Western District of Washington:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above entitled cause, and to include in such transcript of record the following papers and proceedings. You may eliminate all captions, except in the indictment:

Indictment.

Arraignment and Plea.

Motion to Suppress (Journal Entry March 26, 1937).

Minute Entry of Order Dismissing Count II.

Affidavits of Leon Wing, Leong Chong Wing, Leon Chong Wing, and Lyle Gray, David Tow, Lonnie McIntosh, M. L. Hanks, M. W. Pevonak, G. W. Harlow, G. C. Polite, G. W. Harlow, G. C. Polite.

Verdict.

Motion for New Trial.

Order Denying New Trial.

Judgment and Sentence.

Notice of Appeal.

Assignments of Error.

Bond on Appeal.

Motion to Strike Hearsay from Affidavits.

Minute Entries of March 26, 1937.

Order Regarding Directions on Appeal.

Orders Fixing Time for Lodging Bill of Exceptions.

Certified Bill of Exceptions.

This Praecipe.

Clerk's Certificate.

Dated at Seattle, Washington, this 6th day of October, 1937.

JOHN F. GARVIN,
Attorney for Defendant.

Received a copy of the within Praeceptum this 6th day of Oct., 1937.

J. CHARLES DENNIS,

Attorney for U. S.

[Endorsed]: Filed Oct. 6, 1937. [46]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,
Northern Division—ss:

I, Edgar M. Lakin, Clerk of the above entitled Court, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 46 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as the same remain of record and on file in my office, as is required by praecipe of counsel filed and shown herein, with the exception of the Bill of Exceptions and Assignments of Error, the originals of which are transmitted with this transcript; and that the foregoing constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 25th day of October, 1937.

[Seal] EDGAR M. LAKIN,
Clerk, United States District Court, Western Dis-
trict of Washington.

By TRUMAN EGGER,
Deputy. [47]

[Title of Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Comes now the defendant above named and by his attorney submits the following proposed Bill of Exceptions herein.

Be it remembered that the above entitled cause came on for trial on the 5th day of August, 1937, before the Honorable John C. Bowen, in the above entitled court, sitting with the jury duly impaneled and sworn, plaintiff appearing by its attorney, Frank A. Pellegrini, Assistant United States Attorney, and the defendant appearing in person and by his attorney, John F. Garvin, whereupon the following testimony was offered and received, and the following proceedings were had:

The jury was duly impaneled and sworn, whereupon Mr. Pellegrini made the opening statement for the plaintiff herein. Defendant's attorney reserved his opening statement.

G. W. HARLOW,

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows (p. 4):

I have been in the Customs Service for nineteen years and am now an assistant customs agent located in [48] Seattle. I met the defendant, Leong Wing (p. 5) near his home early in January 1937. He was pointed out to me around his home. I tried to observe his movements and on January 29th with other Customs agents we followed him from his home at 3802 Dakota Street to Third and Lenora Streets, and saw him pick up Mr. Gray, his co-defendant. I know he was driving his own car, which is an Oldsmobile sedan. It was at the house all of the times I observed him. Gray got in the car and they drove around. The next time I saw Wing was on February 12th. I saw him at the corner of Dearborn Street and Rainier Avenue, and followed him to Third and Lenora, where Gray got in Wing's car. We surrounded the car, two Customs officers took Gray out of the car, while I and another officer took Wing out. We made a preliminary search there and we asked Mr. Wing to go to the Customs office, where we made a further search and found narcotics. (p. 6). Customs officers Coontz and Polite were in one car, Mr. Cozza and myself were in another car, and Mr. Pevonak. We searched Wing and Gray's persons at the Customs house garage but found nothing on them. Wing drove his car to the garage. I rode with him and Mr. McGrath and Mr. Cozza followed us in the

(Testimony of G. W. Harlow.)

Government car. (p. 7). We further searched the car and found a jar of opium.

“Q. Do you know what that jar contains?

Mr. Garvin: I object to that as incompetent and calling for a conclusion. And I object to it further on the ground that it controverts the fourth and fifth amendments of the Constitution of the United States and of the Espionage Act of 1917. [49]

The Court: This question can be answered by yes or no, and the objection to it as applied to this question is overruled.

Q. Do you know what the jar contains?

A. Yes.

Q. What does it contain?

Mr. Garvin: I object on the same ground.

The Court: Objection overruled.

Mr. Garvin: Exception.

Q. Do you know what is in it?

A. Yes.

Q. How much opium?

A. Possibly one ounce of opium.

Q. Where did you find that jar, plaintiff's exhibit one? (p. 8).

Mr. Garvin: May it be understood, if your Honor please, so that I do not have to repeat the objection, that the same objection runs to all of these questions and it is overruled and an exception allowed?

The Court: Yes, it may be so understood.”

I placed my name on the jar, exhibit one, and

(Testimony of G. W. Harlow.)

identify it by that means. We found it in a compartment in the panel part of the car. It was on top of the glove compartment. Mr. Cozza was present with me while the car was being searched. After we found exhibit one he said he did not have it for sale but that he was a smoker and had it for his own use.

“Mr. Pellegrini: I will now offer in evidence plaintiff’s exhibit one for identification.” (p 9).

[50]

Mr. Garvin: Same objection.

The Court: Same ruling.

(Plaintiff’s exhibit one admitted in evidence.)

Cross Examination

Wing had been pointed out to me prior to January 29th. I saw his car in front of his house on several occasions. It was an Oldsmobile, and we checked up on the license number. That was one of the ways we identified it. (p. 10). We gave the car a preliminary search on Third and Lenora on the 12th of February but did not find exhibit one, until we got in the garage in the Federal Building. I first saw Wing at the corner of Rainier Avenue and Dearborn Streets on the 12th of February. He was driving his car and Customs officers were following it. I was assigned to go to Dearborn and Rainier at about twelve o’clock that day. (p. 11). Mr. Polite gave me my orders and we arrested Wing at about two o’clock in the afternoon. As soon as Gray got in the car we arrested them.

(Testimony of G. W. Harlow.)

Redirect Examination

Mr. Polite instructed me to follow Wing and make an arrest, if possible, on January 29th. (P. 12).

(Witness excused.)

ANTHONY COZZA,

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows:

I am a Captain of the Customs Patrol, residing in Seattle, and have been in the Customs Service for twenty-five years. About one o'clock I saw Wing driving his Oldsmobile sedan, Washington license No. A-95590, at the corner of Dearborn Street and Rainier Avenue. We followed him across Dearborn [51] Street on Fourth Avenue, where he turned on Washington Street. We parked some distance away and observed the car. About 1:50 P. M. Wing got in his car, where he drove to Third and Lenora (P. 14), where Gray got in the car. The three Government cars blocked Wing's car and the officers got out and took the defendants out of the car. Officers rode with Wing to the Federal Office Building garage, where the car was thoroughly searched. (P. 15).

"Q. What did you find in the car, if anything?
Mr. Garvin: I object.

(Testimony of Anthony Cozza.)

The Court: Same ruling."

We found exhibit one, which contains approximately one ounce of smoking opium. He said it was for his own use and was not for sale. He said he was a smoker. I was acting under instructions from Agent Polite.

Recross Examination.

I received instructions about noon (P. 16) and I saw Wing's car between twelve and 1:00 P. M. We arrested Wing about 2:20 in the afternoon. He went in 1303 Washington Street around one o'clock and came out at approximately 1:50 P. M.

(Witness excused).

G. C. POLITE

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows:

I am a Customs agent residing in Seattle and have been in the Customs Service since 1930, being in charge of narcotic smuggling under the Supervising Customs Agent and have been since 1931. I have known of Wing since 1931 and have seen him at various times although I never knew him personally, having received information from various sources as to his [52] activities from brother officers and other sources. He was pointed out to me in 1932 as Wing and I have seen him in 1933, 1935, and 1936. (P. 18). I have seen him from time to time in

(Testimony of G. C. Polite.)

Chinatown and have known who he is since 1931. I have known the defendant Gray since February, 1937. I saw Wing two times in January, 1937 on the 20th and 29th. I received some information and went in the vicinity of Wing's home and observed his car parked in front of his house. He entered the car and seemed to be working inside the compartment of the car (P. 19) and in about fifteen or twenty minutes he re-entered the car and drove away. I followed him to Chinatown and did not see him again that day. I received information at 5:30 or six o'clock on January 20th that he was to deliver narcotics to a white man. I believe that my informant was reliable as he had given me reliable information before. (P. 20). On January 29th I parked my car about a block from Wing's residence where we observed his car back out of the garage and proceed in the direction of the business district. After following the car two or three miles I lost the trail. Customs Officers Harlow, McGrath, Pevonak and Coontz were working with me under my instructions. I told them I had information about Wing. I saw Wing and Gray on February 4th. Officer Coontz and I saw Wing proceeding at the corner of Dearborn Street and Rainier Avenue. They were followed by another Government car in which were Officers McGrath and Pevonak. After Wing's car passed ours we took up the trail to 13th and Washington where we lost the trail. On February 12th I was at Dearborn and Rainier Avenue with

(Testimony of G. C. Polite.)

Officer Coontz and saw the defendant's car proceed on Rainier Avenue, followed by the Government car [53] that Officers McGrath and Pevonak were in. We followed the Government car, which followed Wing to an apartment house between Twelfth and Fourteenth Avenues on Washington Street. We saw him enter and leave the apartment house and drive toward the business district. At Third and Lenora the car stopped and Gray stepped in the car. According to a prearranged plan, we blocked the car with our Government cars and I removed Gray and told him to get out of the car. We made a cursory search and took them to the Federal Building, where Gray admitted he was an opium smoker. I was in charge of the investigation. (P. 23). I observed Wing and Gray on January 29th, February 4th and February 12th, 1937, because I had received information that Wing was to deliver narcotics to a white man. I did not know the white man's name or where they were to be delivered, but that Wing was to deliver them in his car. I knew the kind of car he had. I had known the informant for a period of a year and considered him reliable. (P. 24).

Cross Examination

On February 12th at about noon I received information from an informer that Wing was going to make a delivery of narcotics on that day. Accordingly, we had three Government automobiles follow Wing, two men in each car. On February 12th I did not actually see him commit any crime, and ar-

(Testimony of G. C. Polite.)

rested him on suspicion, finding Exhibit No. 1 bore out the information that I had received that he would deliver narcotics. Relative to my affidavit on file in this cause, the information that I have stated therein I received from Mr. Hanks but the actual seizure was due to the information that I obtained from the informer on noon of the day of the seizure, to-wit, on February 12th.

(Witness excused).

HUGO RINGSTROM,

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows: [54]

I am a Government chemist and have examined Government's exhibit one which contains approximately one ounce of smoking opium.

Cross Examined

(Adopted as a witness by the defendant).

I cannot tell whether exhibit one was prepared from gum opium lawfully imported in the United States or not. (P. 36).

(Witness Excused).

MILO W. PEVONAK,

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows:

I am and for seven years have been a Customs guard stationed in Seattle.

Mr. Garvin: I will admit his testimony will be substantially the same as the other officers. (P. 41).

In a conversation with Gray at the Federal Building he told me he was a smoker; that he knew nothing about the opium in the car and that it did not belong to him.

(Witness Excused).

MARVIN HANKS,

called as a witness on behalf of plaintiff herein, upon being sworn, testified as follows:

I have had charge of narcotic smuggling investigation for the past twelve years on the Pacific Coast. Wing was pointed out to me in 1926. I again saw him in 1931 as a man who had been convicted of violating the narcotic laws. (P. 44). I communicated all my information about Wing to Agent Polite. I told him that Chin Wah, a narcotic dealer, [55] had spoken to me of Wing and of statements a Chinese opium dealer in Chicago told me of Wing. I introduced Mr. Polite to my informers. I had known the informer in this case personally since 1932. He had given me information upon which I acted and made a narcotic seizure. I made a seizure

(Testimony of Marvin Hanks.)

in Aberdeen, Washington, in October, 1934 based upon information the informer gave me and in the Chin Wah case where I was working under cover he confirmed information that I had. (P. 47).

Cross Examination

In the Chin Wah case the informer in this case told me where the speed boat was kept and also its number. Narcotic Officer Morris pointed Wing out to me and said that he dropped through a skylight to arrest him for violating the narcotic laws. Morris told me that Wing was in a hop joint with several other Chinese when it was raided. He said he believed that Wing was interested in an opium smuggling joint. I was really close to the Chin Wah gang but never met Wing with them nor did I ever see him talk to Chin Wah. (P. 49). There might or might not be some significance to seeing a narcotic dealer talking to a gambler of itself, but we are always suspicious. It might or might not mean something when a narcotic dealer talks to another Chinese on the street. (P. 51).

(Witness Excused).

RUSSELL HIATT,

a witness called on behalf of plaintiff herein, upon being duly sworn, testified as follows:

I took a statement made by Wing at the Federal Building. He said he had known Gray for a long

(Testimony of Russell Hiatt.)

time; that he did not [56] know he was an opium smoker and was not going to deliver opium to him, but that he was going to smoke it himself; that he had never met Gray in the same section of town before; that he purchased the opium a few days before; that he paid \$10.00 for it. (p. 53).

The Government rests.

Mr. Garvin: Comes now the defendant Wing, and moves the court to instruct the jury and direct the jury to return a verdict of not guilty, for the reason that there is no substantial evidence bearing out the charges of the indictment herein; and upon the further ground that it appears affirmatively from the testimony that Exhibit 1, the narcotics in question, was seized in contravention of his rights under the Constitution and laws of the United States; and third, that there is no substantial evidence that the narcotics in question were ever imported into the United States in violation of law.

The Court: The motion is denied and an exception allowed.

The defendant makes an opening statement to the jury.

LYLE G. GRAY,

one of the defendants, after being duly sworn, testified as follows:

I have known Wing seven or eight years and worked for him at the Jockey Club, which was a beer parlor and restaurant, as a bartender. I have been

(Testimony of Lyle G. Gray.)

convicted of violating the liquor and narcotic laws. Wing said he could get a charter for a club in Yakima or Aberdeen and wanted me to investigate and manage the place if it was opened. I decided [57] Yakima was the best town and we conferred at different times about the club. I saw Wing six or seven times in that connection. I met him by appointment on the 12th of February and after I started to get in the car officers arrested and searched me. The first time I saw exhibit one was in the Customs office. I did not know it was in the car and had no interest in it. (p. 58). I had worked for Wing.

Cross Examination

I do not know where Wing lives or that he is part owner in the Hankow Cafe. I lived on First Avenue between Pike and Pine. We talked this business over for a period of three months. I do not remember whether I met him on January 29th or not. I met him twice at Third and Lenora and once at Second and Virginia by accident. (p. 60). I have not been smoking opium for seven years. (p. 61).

(Excused).

LEONG CHONG WING,

one of the defendants, after being duly sworn, testified as follows:

I was born in Oregon and was convicted six years ago in Federal Court in a narcotic case. I have

(Testimony of Leong Chong Wing.)

been in the lottery and restaurant business. I knew Chin Wah for a long time but had no dealings with him. I just knew him because he was Chinese. I was a partner of Tommy Wong's in the Jockey Club but did not deal with Chin Wah or Tommy Wong in narcotics. I have known Gray for seven or eight years. I bought drinks in his place and he worked for me at the Jockey Club. It was a chop suey house, beer parlor, and dance hall. I met Gray on the 29th of [58] January, the 4th and 12th of February, and we talked about opening up a club out of town. He advised me that Yakima was a better town and I made trips over to look around. I smoked opium for many years and suffered from a rectal trouble that I have since been operated on for. I smoked to kill the pain. I had this sickness for ten years. I don't use narcotics any longer, and live with my family, consisting of a wife and two children, on Dakota Street. My wife would not permit me to smoke opium at home (p. 66), so I was coming to an apartment on Washington Street to smoke. I could not get in. I was not going to sell narcotics to Gray.

Cross Examination

I bought the narcotics from Chin Lee, who was going to China. (p. 67). I paid \$10.00 for a big can.

Q. As a matter of fact, you are an opium importer, aren't you, and bring it in and sell it, don't you? You had brought it in to sell it, hadn't you?

(Testimony of Leong Chong Wing.)

Mr. Garvin: I object. I think the question is improper.

The Court: Objection sustained.

Mr. Pellegrini: I will withdraw the question.

Q. You know Chin Wah?

A. Yes.

Q. He used to be in partners with you, didn't he?

A. No.

Q. If Mr. Hanks said he was in partners with you he was wrong, was he?

Mr. Garvin: Mr. Hanks never said any such a thing. [59]

Q. If Mr. Hanks were to testify that you and Chin Wah used to be partners he would not be telling the truth, is that it?

Mr. Garvin: I assign counsel's question as misconduct.

The Court: I think that is not a proper question. Objection sustained.

Mr. Pellegrini: I can put Mr. Hanks on the stand.

Mr. Garvin: I object as further misconduct—counsel's statement of what he could do.

The Court: Objection sustained, and the jury will disregard it.

Q. Were you convicted in 1931 of a violation of the narcotic importing and exporting act? Answer yes or no. Isn't that the charge?

(Testimony of Leong Chong Wing.)

Mr. Garvin: Produce the charge and I will tell you whether he was or not.

Q. Were you convicted of violating the narcotics importing and exporting act in 1931?

Mr. Garvin: I object as calling for a conclusion on a question of law.

Q. If you know, I said.

The Court: He may answer if he knows.

Q. Do you know?

A. No.

The defendant rests. (p. 69).

Mr. Pellegrini: At this time, if the Court please, I request permission to get the original file of the conviction [60] of the defendant Leong Wing showing what crime he was convicted of, in rebuttal.

Mr. Garvin: I object to that as incompetent. The purpose of a record of conviction is to affect the credibility of a witness. The defendant has testified fully relative to it. If he has not testified correctly it is for the purpose of impeachment. I have no objection to it going in for that purpose. I ask counsel directly if he intends to use it for the purpose of impeachment, and if he does not so intend I desire to assign counsel's offer as misconduct.

Mr. Pellegrini: I offer it for the purpose of impeachment of the witness when he says it was for smoking and nothing else.

Mr. Garvin: There is no such offense as smoking. The man comes into this court charged under either the Jones or Harrison Act—I ask for a mistrial based on counsel's last statement. You cannot impeach a man in the face of this record.

The Court: The objection is sustained. The statement of counsel may be stricken and the jury instructed to disregard it. The application for a mistrial is denied, and an exception allowed. Is there any rebuttal testimony?

Mr. Pellegrini: No rebuttal testimony.

(The jury thereupon temporarily retired).

Mr. Garvin: May it please the court, both the plaintiff and defendant having rested, the defendants and each of them renew the motions heretofore made.

The Court: The motion for an instructed verdict as to the defendant Gray is granted. The motion is denied as to the other defendant. Exception allowed. [61]

(Argument of counsel followed).

The Court properly instructed the jury but did not submit to them the question of the legality of the search, the Court passing upon that question as a matter of law. [62]

[Title of Court and Cause.]

(Excerpt from Journal Entry.)

ORDER OVERRULING DEMURRER AND
DENYING MOTIONS TO ELECT, QUASH,
SUPPRESS, STRIKE, TO MAKE MORE
DEFINITE AND CERTAIN.

Now on this 26th day of March, 1937, F. A. Pelligrini, Assistant United States District Attorney, appearing for the plaintiff, and John F. Garvin, Esq., appearing for the defendant, this cause comes on for hearing on demurrer to indictment, motion to quash indictment, motion to suppress evidence; motion to elect; motion to make Count II of the indictment more definite and certain; oral motion to strike conclusions of law in plaintiff's controverting affidavits on motion to suppress.

Arguments of counsel were heard on the demurrer and each and all of said motions. The demurrer is overruled and each and every of the motions is denied, and exceptions allowed defendant to each and every of said ruling of the Court. [63]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

Leong Chong Wing, being first duly sworn, upon his oath deposes and says:

That on the 12th day of February, 1937 when officers and agents of the United States government searched his automobile he absolutely did not consent to said search, nor invite said officers to search his automobile.

That affiant specifically denies that G. C. Polite, assistant customs agent, could have received reliable information that affiant was to meet a white man for the purpose of making a delivery of narcotic drugs for the reason that affiant was not going to, and never had any intention of meeting a white man for the purpose of making a delivery of narcotic drugs on the above named date or at any other time.

That in the year of 1931 affiant was arrested for being in a place where opium was smoked and was convicted in this court for said offense and received a sentence of five months, and affiant specifically denies that he has ever been convicted of being a dealer in narcotic drugs; that affiant has smoked opium but has never sold or dealt in narcotic drugs.

Further affiant sayeth not.

LEONG CHONG WING.

Subscribed and sworn to before me this 26th day of March, 1937.

WARREN HARDY,

Notary Public in and for the State of Washington,
residing at Seattle. [65]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

Leong Chong Wing, being first duly sworn, upon his oath deposes and says: That on the 12th day of February, 1937 at the hour of about two o'clock p. m. he was riding in his automobile. That certain agents and officers of the United States, without any warrant for his arrest or warrant to search his car, arrested affiant and searched his car; that your affiant had committed no crime in the presence of said officers and that they had no reasonable ground to suspect that affiant had committed a felony; that affiant was not guilty of any breach of the public peace; that said officers searched your affiant's car and took therefrom a certain quantity of narcotic drugs; that your affiant has grounds to believe and does believe that said narcotics will be used against him in the trial of said cause; that there was no

legal authority whatsoever for said search. Further affiant sayeth not.

LEONG CHONG WING.

Subscribed and sworn to before me this 10th day of March, 1937.

WARREN HARDY,
Notary Public in and for the State of Washington,
residing at Seattle. [66]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

G. W. Harlow, being first duly sworn on oath deposes and says:

That he is an assistant Customs Agent, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That your affiant has known the defendant Leong Chong Wing since on or about January 1, 1937. That on or about January 1, 1937 your affiant was advised by his superior officers and by other officers in the Customs Service, to-wit, M. L. Hanks, Customs Agent, and G. C. Polite, Assistant Customs Agent, that the said defendant had theretofore been convicted of a violation of the narcotic laws of

the United States and that the said defendant had recently received a large shipment of opium and other narcotic drugs and was engaged in the illicit sale of the said narcotic drugs, and your affiant was ordered by his superior officers to observe the said defendant. [67]

That on or about January 29, 1937 your affiant was advised by his said superior officers that the said defendant Leong Chong Wing would meet a white man for the purpose of effecting an illegal sale of narcotics and that said defendant would be transporting narcotics in his automobile. That on said date your affiant observed the said defendant leave his home at 3802 Dakota Street, in the City of Seattle, Washington, driving an Oldsmobile sedan owned by the said defendant. That your affiant followed the said defendant from his said home to the corner of Third Avenue and Lenora Street, in the city of Seattle, Washington, at which point your affiant observed a white man get into the automobile of the said defendant Leong Chong Wing, the said white man being later identified as the co-defendant herein, Lyle G. Gray. That the said defendant, Leong Chong Wing, accompanied by the said Lyle G. Gray, thereupon proceeded in a northerly direction along Third Avenue and south on Fourth Avenue to Virginia Street at which point your affiant departed after carefully scrutinizing the defendant Leong Chong Wing and the said Lyle G. Gray so that he could identify them in the future.

That on or about February 12, 1937 your affiant was advised by his said superior officers and by G. C. Polite, Assistant Customs Agent, that the said defendant Leong Chong Wing would meet a white man to effect a delivery of narcotic drugs and that the said defendant would transport said drugs in his said automobile. That on the said date your affiant, in company with G. C. Polite, Assistant Customs Agent, A. H. Koons, Captain of the Customs Guards, [68] A. Cozza, Chief Patrol Inspector, United States Customs Service, F. N. McGrath, Customs Patrol Inspector, and M. W. Pevonak, Customs Guard, observed the said defendant Leong Chong Wing meet Lyle G. Gray, co-defendant in the above entitled action, on the corner of Third Avenue and Lenora Street, in the City of Seattle, Washington, the said defendant Leong Chong Wing arriving at the said point in an automobile. That upon the arrival of the said defendant Leong Chong Wing, the said Lyle G. Gray entered the said automobile of the defendant Leong Chong Wing and closed the door. That your affiant and the said officers thereupon placed the said Leong Chong Wing and Lyle G. Gray under arrest and thereupon proceeded to search the said automobile for opium and/or other narcotic drugs, and found secreted in said defendant's automobile, in back of the instrument panel on top of the glove compartment, a glass jar containing one ounce of opium prepared for smoking, which said merchandise had been theretofore imported into the United States contrary to law. That your affiant had reasonable cause

to believe and did believe that the defendant Leong Chong Wing was engaged in the commission of a felony at the time the said Leong Chong Wing was arrested.

G. W. HARLOW

Subscribed and sworn to before me this 20 day of March, 1937.

TRUMAN EGGER

Deputy Clerk, U. S. District Court
Western District of Washington.

[69]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

M. W. Pevonak, being first duly sworn on oath deposes and says:

That he is a Customs Guard, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That your affiant has known the defendant Leong Chong Wing since on or about December 15, 1936. That your affiant was advised on or about said date by his superior officers in the Customs Service, and more particularly by G. C. Polite, Assistant Customs Agent, that the said defendant Leong Chong

Wing was a known, previously convicted dealer in narcotics and that information had been received by the said officers that the said defendant Leong Chong Wing had recently received a shipment of opium prepared for smoking and other narcotic drugs which said shipment had been illegally imported into the United States and that the said defendant was engaged in the illicit sale of the said narcotic drugs. That your affiant was thereupon ordered to keep the said defendant Leong Chong Wing under observation and that your affiant from on or about December 15, [70] 1936 to February 12, 1937, on numerous occasions, observed the said defendant in and about the vicinity of the district known as "Chinatown" in the city of Seattle, Washington.

That on or about February 4, 1937 your affiant was advised by G. C. Polite, Assistant Customs Agent, one of his superior officers, that the said defendant Leong Chong Wing would meet a white man for the purpose of effecting an illicit sale and delivery of narcotics and that the said defendant would be transporting the said narcotics in his automobile. That on said date your affiant, accompanied by F. N. McGrath, Customs Patrol Inspector, observed the said defendant Leong Chong Wing leave his home at 3802 Dakota Street, Seattle, Washington, driving an Oldsmobile sedan. That they followed the said defendant from his said home to the vicinity of Second Avenue and Virginue Street in the city of Seattle, Washington. That at the said point the

said defendant Leong Chong Wing stopped his automobile and met a white man who was later and on or about February 12, 1937, identified as Lyle G. Gray. That at the said time the said Lyle G. Gray entered the said automobile and the defendant Leong Chong Wing thereupon proceeded to drive the said automobile to the vicinity of Third Avenue and Stewart Street in the said city of Seattle. That the said Lyle G. Gray thereupon alighted from the said automobile and the said defendant Leong Chong Wing proceeded to drive his automobile to the "Chinatown" district in the city of Seattle.

That on or about February 12, 1937 your affiant was advised by his said superior officers in the Customs [71] Service that the said defendant Leong Chong Wing would meet a white man to effect a delivery of narcotic drugs and that the said defendant would transport said drugs in his said automobile. That on the said date your affiant, in company with G. C. Polite, Assistant Customs Agent, G. W. Harlow, Assistant Customs Agent, A. H. Koons, Captain of the Customs Guards, A. Cozza, Chief Patrol Inspector, United States Customs Service, and F. N. McGrath, Customs Patrol Inspector, observed the said defendant Leong Chong Wing meet Lyle G. Gray, co-defendant in the above entitled action, on the corner of Third Avenue and Lenora Street, in the city of Seattle, Washington, the said defendant Leong Chong Wing arriving at the said point in an automobile. That upon arrival of the said defendant Leong Chong Wing, the said

Lyle G. Gray entered the said automobile of the defendant Leong Chong Wing and closed the door. That your affiant and the said officers thereupon placed the said Leong Chong Wing and Lyle G. Gray under arrest and thereupon proceeded to search the said automobile for opium and/or other narcotic drugs, and found secreted in said defendant's automobile, in back of the instrument panel on top of the glove department, a glass jar containing one ounce of opium prepared for smoking, which said merchandise had been theretofore imported into the United States contrary to law. That your affiant had reasonable cause to believe and did believe that the defendant Leong Chong Wing was engaged in the commission of a felony at the time the said Leong Chong Wing was arrested.

M. W. PEVONAK.

Subscribed and sworn to before me this 20th day of March, 1937.

TRUMAN EGGER,
Deputy Clerk, U. S. District Court, Western District of Washington. [72]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

M. L. Hanks, being first duly sworn on oath deposes and says:

That he is a Customs Agent, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That your affiant has known the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, alias Leon Wing, for a period of approximately eleven years. That during all the said times your affiant has known the said defendant Leong Chong Wing, the said defendant has had the reputation of being an illicit dealer in opium and other narcotic drugs. That your affiant has had reliable information during all the said time that the said defendant has associated with persons known to be illicit dealers in opium and other narcotics, more particularly that the said defendant associated with one Chin Wah who was heretofore and on or about May 13, 1935 convicted in the above entitled Court on a plea of guilty in causes number 43576 and 43578.

That on or about December 15, 1936 your affiant received reliable information that the defendant Leong [73] Chong Wing had received a shipment of

opium, morphine and other narcotic drugs and that the said defendant was engaged in the illicit sale of the said opium, morphine and other narcotic drugs in the city of Seattle, Washington, and within the Customs Collection District of the Western District of Washington.

(signed) MELVIN L. HANKS.

Subscribed and sworn to before me this 22nd day of March, 1937.

(signed) S. COOK,
Deputy Clerk, U. S. District Court, Western District of Washington. [74]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

G. C. Polite, being first duly sworn, on oath deposes and says:

That he is an assistant Customs agent, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That on or about the 19th day of March, 1937, your affiant herein made and executed an affidavit on the motion to suppress heretofore filed herein, wherein your affiant stated that on or about January 29th, February 4th and February 12th, 1937, your

affiant received reliable information that the defendant Leong Chong Wing was to meet a white man for the purpose of making a delivery of narcotic drugs, and that the defendant was transporting opium and other narcotic drugs in his automobile. That your affiant has heretofore received from the said informant, whose name your affiant does not feel at liberty to disclose, reliable information, and that upon many occasions your affiant acted upon the said information and found that the information given to him by the informant was accurate.

[75]

Further affiant sayeth not.

G. C. POLITE.

Subscribed and sworn to before me this 22nd day of March, 1937.

TRUMAN EGGER,

Deputy Clerk, U. S. District Court, Western District of Washington. [76]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America,
Western District of Washington,
Northern Division—ss.

G. W. Harlow, being first duly sworn, on oath deposes and says:

That he is an assistant Customs Agent, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on

behalf of the plaintiff herein, and for the purpose of supplementing affidavit heretofore filed in the above entitled cause.

That he was present at the searching of the automobile of the defendant, Leong Chong Wing, on or about February 12, 1927; that the said Leong Chong Wing did not object to a search being made of said automobile; that after finding opium in the said defendant's automobile, the defendant Leong Chong Wing admitted that the said opium belonged to him, but stated that it was for his own personal use.

Further affiant sayeth not.

G. W. HARLOW.

Subscribed and sworn to before me this 22nd day of March, 1937.

TRUMAN EGGER,
Deputy Clerk, U. S. District Court, Western District of Washington. [77]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America
Western District of Washington
Northern Division.—ss.

Lonnie McIntosh, being first duly sworn on oath deposes and says:

That he is a Narcotic Agent of the Bureau of Narcotics, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That he is acquainted with the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, alias Leon Wing, having known the said defendant for approximately three years. That heretofore and on or about March 23, 1931, in cause number 41286 in the above entitled Court, the said defendant Leong Chong Wing was convicted and sentenced for violation of the Narcotic Drugs Import and Export Act upon a plea of guilty.

That during all the times your affiant has known the said defendant Leong Chong Wing, the said defendant has had the reputation of being a dealer in narcotic drugs and your affiant has on numerous occasions received complaints of the activities of the defendant Leong Chong Wing in the sale of narcotic drugs. [78]

That on or about December 15, 1936 your affiant received reliable information that the said defendant Leong Chong Wing has received a quantity of smoking opium and morphine and that the said defendant was selling the said opium and morphine in the city of Seattle, Washington.

That your affiant has on numerous occasions seen the defendant Leong Chong Wing in the company of and associating with other persons who have heretofore been convicted of the illicit sale of narcotics and are known to your affiant to be engaged in the illicit sale of opium and other narcotics. More particularly has your affiant observed the defendant Leong Chong Wing in company with one Tommy Wong, a known narcotic dealer, the said Tommy Wong having heretofore and on, or about January 30,

1933, in cause number 42043 in the above entitled Court, been convicted and sentenced for violation of the Harrison Narcotic Act.

LONNIE McINTOSH

Subscribed and sworn to before me this 20 day of March, 1937.

TRUMAN EGGER

Deputy Clerk, U. S. District Court, Western District of Washington. [79]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America
Western District of Washington
Northern Division.—ss.

David Tow, being first duly sworn on oath deposes and says:

That he is a Narcotic Agent of the Bureau of Narcotics, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That he is acquainted with the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, alias Leon Wing, having known the said defendant for approximately six years. That heretofore and on or about March 23, 1931, in cause number 41286 in the above entitled Court, the said defendant Leong Chong Wing was convicted and sentenced for violation of the Narcotic Drugs Import and Export Act upon a plea of guilty.

That during all the times your affiant has known the said defendant Leong Chong Wing, the said defendant has had the reputation of being a dealer in narcotic drugs and your affiant has on numerous occasions received complaints of the activities of the defendant Leong Chong Wing in the sale of narcotic drugs. [80]

That on or about December 15, 1936 your affiant received reliable information that the said defendant Leong Chong Wing had received a quantity of smoking opium and morphine and that the said defendant was selling the said opium and morphine in the city of Seattle, Washington.

That your affiant has on numerous occasions seen the defendant Leong Chong Wing in the company of and associating with other persons who have heretofore been convicted of the illicit sale of narcotics and are known to your affiant to be engaged in the illicit sale of opium and other narcotics. More particularly has your affiant observed that defendant Leong Chong Wing in company with one Tommy Wong, a known narcotic dealer, the said Tommy Wong have heretofore and on or about January 30, 1933, in cause number 42043 in the above entitled Court, been convicted and sentenced for violation of the Harrison Narcotic Act.

DAVID F. TOW

Subscribed and sworn to before me this 20 day of March, 1937.

TRUMAN EGGER

Deputy Clerk, U. S. District Court, Western District of Washington. [80a]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America
Western District of Washington
Northern Division.—ss.

G. C. Polite, being first duly sworn on oath deposes and says:

That he is an Assistant Customs Agent, Bureau of Customs, Treasury Department of the United States, and as such makes this affidavit for and on behalf of the plaintiff herein.

That your affiant has known the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, alias Leon Wing, ever since 1931.

That on or about March 23, 1931 the said defendant Leong Chong Wing, upon a plea of guilty, was convicted and sentenced by the above entitled Court in cause number 41286. That during all the time your affiant has known said defendant Leong Chong Wing, said defendant has had the reputation of being an illicit dealer in opium and other narcotic drugs.

That prior to January 29, 1937 your affiant received information from his superior officer in the Customs Service, to wit, M. L. Hanks, Customs Agent, and from Lonnie McIntosh and David Tow, Narcotic Agents of the Bureau [81] of Narcotics, Treasury Department of the United States, that the said defendant Leong Chong Wing had received

a shipment of opium prepared for smoking and other narcotic drugs and that the said defendant was engaged in the illicit sale of said narcotics.

That on or about January 29, 1937 your affiant received reliable information that the said defendant Leong Chong Wing was to meet a white man for the purpose of effecting a delivery of narcotic drugs and that said defendant was transporting opium and other narcotic drugs in his automobile. That on or about January 29, 1937 your affiant received definite and reliable information that during the afternoon of the said day the defendant Leong Chong Wing did meet a white man to effect a delivery of opium and/or other narcotic drugs.

That on or about February 4, 1937 your affiant received reliable information that the said defendant Leong Chong Wing was to meet a white man for the purpose of effecting a delivery of narcotic drugs and that said defendant was transporting opium and other narcotic drugs in his automobile. That on or about February 4, 1937 your affiant received definite and reliable information that during the afternoon of the said day the defendant Leong Chong Wing did meet a white man to effect a delivery of opium and/or other narcotic drugs.

That on or about February 12, 1937 your affiant received definite and reliable information that the said defendant Leong Chong Wing would meet a white man to effect the delivery of narcotic drugs and that said defendant would transport said drugs in his automobile. That on the said date your affiant,

in company with G. W. Harlow, Assistant [82] Customs Agent, A. H. Koons, Captain of the Customs Guards, A. Cozza, Chief Patrol Inspector, United States Customs Service, F. N. McGrath, Customs Patrol Inspector, and M. W. Pevonak, Customs Guard, observed the said defendant Leong Chong Wong meet Lyle G. Gray, co-defendant in the above entitled action, on the corner of Third Avenue and Lenora Street, in the city of Seattle, Washington, the said defendant Leong Chong Wing arriving at the said point in an automobile. That upon the arrival of the said defendant, the said Lyle G. Gray entered the said automobile of the defendant Leong Chong Wing and closed the door.

That your affiant and the said officers thereupon placed the said Leong Chong Wing and Lyle G. Gray under arrest and thereupon proceeded to search the said automobile for opium and/or other narcotic drugs, and found secreted in said defendant's automobile, in back of the instrument panel on top of the glove compartment, a glass jar containing one ounce of opium prepared for smoking, which said merchandise had been theretofore imported into the United States contrary to law. That prior to the arrest of the said defendants on February 12, 1937 your affiant had been informed by officers of the Customs Service that on January 29, 1937 and February 4, 1937 the said defendant Leong Chong Wing was observed on the said occasions to pick up the defendant Lyle G. Gray in the vicinity of Third Avenue and Lenora Street and Second

Avenue and Virginia Street in the city of Seattle, Washington. That your affiant had reasonable cause to believe, and did believe, that the defendant [83] Leong Chong Wing was engaged in the commission of a felony at the time the said Leong Chong Wing was arrested.

G. C. POLITE

Subscribed and sworn to before me this 20th day of March, 1937.

TRUMAN EGGER,

Deputy Clerk, U. S. District Court, Western District of Washington. [84]

[Title of Court and Cause.]

MOTION TO STRIKE.

Comes now the defendant and moves the Court to strike all hearsay portions of the affidavits of Federal customs agents and narcotic agents filed herein controverting the motion and affidavits to suppress.

JOHN F. GARVIN

Attorney for Defendants. [85]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America
Western District of Washington
Northern Division—ss.

Leong Wing, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants herein, that any information received by M. W. Pevonak, G. W. Harlow, G. C. Polite, David Tow, M. L. Hanks, Lonnie McIntosh, or any other officers or agents of the United States Government that affiant had received a quantity of smoking opium and morphine on the 15th day of December, 1936, or prior thereto, was absolutely unreliable and false; that the smoking opium found by the unlawful search of affiant's car was not acquired by affiant until the latter part of January, 1937.

That your affiant did not meet Lyle G. Gray, or any other persons, on the 29th day of January, 4th day of February, 12th day of February, all in the year of 1937, or at any other time, for the purpose of selling, delivering, or otherwise transacting any negotiations with reference to any narcotic drugs, that affiant has never discussed opium or any other narcotic with the said Lyle G. Gray.

That affiant is acquainted with one Tommy Wong and one Chin Wah, as he is naturally acquainted with practically every Chinese person residing in Seattle, [86] Washington; that he has never been informed that the said Tommy Wong or Chin Wah were re-

puted to be dealers in narcotics, that he has not associated with them any more frequently than he has associated with the rest of the people of his race in the city of Seattle; that your affiant specifically denies that he has on numerous occasions associated with persons convicted of the illicit sale of narcotics or engaged in the illicit sale of narcotics.

That on the 12th day of February, 1937 in the vicinity of 3rd ave. and Lenora Street in Seattle, Washington, he met the co-defendant, Lyle G. Gray, that said Lyle G. Gray approached affiant's car, opened the door and had partially seated himself but had not yet closed the car door when officers and agents of the United States Government seized the said Lyle G. Gray, jerked him out of the automobile and escorted him down the street; thereupon officers and agents of the United States Government searched affiant's automobile and found a small quantity of smoking opium and then placed your affiant under arrest; that neither your affiant or the said Lyle G. Gray had committed any misdemeanor in the presence of said officers, nor had they committed any act which would give said officers probable cause to believe either your affiant or the said Lyle G. Gray had committed a felony.

LEONG WING

Subscribed and sworn to before me this 23 day of March, 1937.

WARREN HARDY,

Notary Public in and for the State of Washington,
residing at Seattle. [87]

[Title of Court and Cause.]

AFFIDAVIT.

United States of America
Western District of Washington
Northern Division.—ss.

Lyle G. Gray, being first duly sworn, upon his oath deposes and says: That he is one of the co-defendants herein. That he did not meet the defendant, Leong Wing, on the 29th day of January, 1937, or on the 12th day of February, 1937, nor any other time, for the purpose of purchasing or receiving smoking opium, morphine, nor any other narcotic drug. That on the 12th day of February, 1937 your affiant saw the defendant, Leong Wing, in the vicinity of 3rd Ave. and Lenore Street in the city of Seattle, and approached the automobile which the said Leong Wing was driving; that he had opened the door and had partially seated himself and had not yet closed the car door when several Federal agents and officers ran up and seized him and jerked him out of the car and escorted him to a gasoline service station approximately seventy feet away; that upon arriving at said gasoline service station the said officers talked to affiant for a few moments, searched his person and informed him that he was under arrest; that affiant was not present when said officers searched the automobile of said Leong Wing, that nothing was said by said officers to affiant about [88] arrest until after they reached said gasoline service station.

That affiant has never dealt with the said Leong Wing for the purchase or sale of narcotic drugs;

that he has never discussed narcotics in any way whatsoever with the said Leong Wing, that he has never heard or been informed that the said Leong Wing was reputed to be a dealer in narcotics and that he did not know that the said Leong Wing had any narcotics in his possession at that time or at any other time.

That at the time said officers seized and subsequently arrested affiant, neither your affiant or the said Leong Wing had committed any misdemeanor in the presence of said officers, nor committed any act which would give said officers probable cause to believe that the said Leong Wing had committed a felony.

LYLE G. GRAY

Subscribed and sworn to before me this 23 day of March, 1937.

WARREN HARDY

Notary Public in and for the State of Washington,
residing at Seattle. [89]

[Title of Court and Cause.]

ORDER FIXING TIME FOR LODGING BILL
OF EXCEPTIONS.

This matter coming before the Court upon the citation heretofore issued to the respective parties and their attorneys on the 9th day of August, 1937, and both parties being represented by their respective counsel, and the Court having considered the matter in the premises, and after hearing testimony

upon the same and it being fully advised with reference to the facts by the respective counsel, it is hereby

Ordered, Adjudged and Decreed that Leong Chong Wing shall have up to and including the 7th day of October, 1937 in which to procure, to be settled and to file, the Bill of Exceptions, and also to file his Assignment of Errors in his appeal now pending before the United States Circuit Court of Appeals for the Ninth Circuit, and it is further

Ordered, Adjudged and Decreed that the term of court in which said cause was tried be, and hereby is, extended to and including the 7th day of October, 1937, for the purposes herein expressed.

Done in Open Court this 7th day of Sept. 1937.

JOHN C. BOWEN,

Judge.

O. K. as to form:

F. A. PELLEGRINI

Assistant U. S. Attorney.

Presented by:

JOHN F. GARVIN

Attorney for Appellant. [90]

[Title of Court and Cause.]

CERTIFICATE.

I, John C. Bowen, Judge of the United States District Court for the Western District of Washington, Northern Division, and the Judge before whom the above entitled action was tried, to-wit:

The Cause entitled United States of America versus Leong Chong Wing, defendant, do hereby certify that on this 7th day of October, 1937, and within the term in which the judgment in the above entitled cause was entered and extended according to law, and within the time limited by law and the rules of this Court and the Circuit Court of Appeals of the United States for the Ninth Circuit, and of the Supreme Court of the United States as extended by the order of the trial Judge herein as set forth in the foregoing pages, came on regularly for hearing and settlement of the Bill of Exceptions herein, and that the above and foregoing Bill of Exceptions was prior thereto duly and regularly lodged with the Clerk of the said Court, and duly and regularly and timely served within the time authorized by law upon the United States District Attorney for this district, and was on this date brought to the personal attention of the trial Judge, and that no amendments were [91] proposed to the said Bill of Exceptions, and that due and regular notice of the time for settlement and certifying the said Bill of Exceptions was given and the Court being fully advised,

It Is Ordered that the foregoing Bill of Exceptions, consisting of pages 1 to 44, inclusive, contain all of the evidence introduced upon the trial of the above entitled action "necessary to present clearly the questions of law involved in the rulings to which exceptions were reserved."

And Now Therefore the said and foregoing Bill of Exceptions is hereby Settled, Allowed, Certified, and Filed as the Bill of Exceptions, and as such is made a part of the record in the above entitled cause.

Done in open court this 7th day of October, 1937.

JOHN C. BOWEN

United States District Judge.

O K as to form.

JOHN F. GARVIN

J. CHAS. DENNIS

U. S. Attorney.

[Endorsed]: Lodged and filed Oct. 7, 1937. [92]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the appellant, Leong Chong Wing, and in support of his appeal herein submits the following Assignments of Error as basis for the reversal of the judgment and sentence imposed upon him in the above entitled court on the 5th day of August, 1937, in the above entitled cause:

I.

That the court erred in failing to grant defendant's motion to suppress.

II.

That the court erred in admitting Government's Exhibit 1 in evidence.

III.

That the court erred in not granting a mistrial because of misconduct.

IV.

That the court erred in not directing a verdict of not guilty for the defendant Wing.

Dated at Seattle, Washington, this 7th day of October, 1937.

JOHN F. GARVIN

Attorney for the Appellant. [93]

Received a copy of the within assignments this 7th day of October, 1937.

G. CHARLES DENNIS

Attorney for Respondent.

[Endorsed]: Filed Oct. 7, 1937. [94]

[Endorsed]: No. 8650. United States Circuit Court of Appeals for the Ninth Circuit. Leong Chong Wing, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 27, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. _____

In the United States
Circuit Court of Appeals
For the Ninth Circuit

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JOHN F. GARVIN,

Attorney for Appellant.

1122 Northern Life Tower
Seattle, Washington.

FILED

JAN 27 1938

PAUL P. O'BRIEN

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No. _____

In the United States
Circuit Court of Appeals
For the Ninth Circuit

LEONG CHONG WING,
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

} No. 8650

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION OF THE COURT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging the appellant and one Lyle G. Gray with unlawfully, knowingly and feloniously receiving, concealing, buying and selling and facilitating the transportation and concealment of opium prepared for smoking (Section 174, Title 21, U.S.C.A.) and also of wilfully, unlawfully

and feloniously concealing and transporting opium prepared for smoking, which had been imported into the United States from a foreign country without submission for inspection by any officer of the customs service of the United States (Section 1593 b. Title 19 U.S.C.A.).

The Federal Courts have jurisdiction to determine issues arising out of the construction of Federal statutes (28 U.S.C.A. 41; Judicial Code, Section 24, Paragraph 1).

The Circuit Court of Appeals has jurisdiction to reverse judgments of the District Court (28 U.S.C.A., Section 225; Judicial Code, Section 128).

STATEMENT OF THE CASE

The Grand Jury for the Northern Division of the Western District of Washington, during the January term of 1937, returned an indictment against Leong Chong Wing and Lyle G. Gray, charging them in count one with unlawfully, knowingly, feloniously and fraudulently receiving, concealing, buying, selling and facilitating the transportation and concealment after importation of one ounce of opium prepared for smoking and also charging them in count two with wilfully, unlawfully, feloniously and fraudulently receiving, concealing, buying, selling and facilitating the transportation and concealment of certain dutiable merchandise, to-wit: one ounce of opium prepared for smoking, with-

out the same having been submitted for inspection by any officer of the customs service of the United States.

On the day of the trial, on oral motion by the United States District Attorney, count two of the indictment was dismissed. On the 5th day of August, 1937, the appellant, Leong Chong Wing, was found guilty as charged in count one of the indictment and Lyle G. Gray was found not guilty in count one of said indictment. The evidence tended to show that several years ago the appellant was convicted of a violation of the narcotic laws; that on January 29, 1937, customs agents followed the appellant's car from his home in the residential district of Seattle to the downtown district and saw him pick up Mr. Gray in his automobile. On February 12th customs agents again followed the appellant's car from his said home and at 3rd and Lenora streets in the city of Seattle, they saw the car stop and Mr. Gray entered the car. The officers immediately blocked the car from traffic and placed the appellant and the said Gray under arrest. At that time the officers gave the car a hasty search without finding anything; took the appellant and Gray into custody and brought them to the customs office in the Federal Building and took the appellant's car to the Customs Garage and officers thereupon searched the car again and found one ounce of opium prepared for smoking.

The officers knew the license number of Wing's car since January 29th, but made no effort to procure a

search warrant for the search of the same, although they claimed to have information that Wing had received a quantity of narcotics about December 15th, and they claimed to have had information from a source they considered reliable that Wing was to deliver narcotics to a white man on February 12th.

A motion to suppress was made prior to the trial, denied, and an exception noted, which motion was thereafter renewed during the progress of the trial, and upon the introduction of State's Exhibit 1 in evidence, being the ounce of opium found in Wing's car at the Customs garage, and objected to as contravening the rights of the appellant under the Constitution and laws of the United States, upon being overruled, an exception was again noted. (R. pp. 26, 27, 28, 35, 40.)

A motion for a directed verdict was made at the close of the Government's case, renewed at the close of all the testimony, and upon the Court denying the same, exceptions were reserved. (R. pp. 35, 40.)

Most of the hearsay evidence was permitted to go into the record in order that the Court could have a full and complete picture of the facts to determine whether or not the officers had probable cause in making the arrest, search and seizure.

The appellant, Wing, was arrested at the corner of 3rd and Lenora at the hour of about 2:30 p. m., while customs agents were following him since about 12:30

p. m. (R. pp. 27, 29, 32.) He was followed by three Government cars and visited an apartment house, where he remained for a considerable period of time. The distance from where he was first seen and was finally arrested is approximately a mile and a half.

B. C. Polite, who was in charge of the detail, arrested Wing and Gray on suspicion, and the finding of the narcotics in the car at the Customs garage bore out his suspicions that the information he had had prior to this time was correct. (R. p. 32.)

The questions raised for review on this appeal are briefly as follows:

1. Failure of the trial court to direct a verdict in the appellant's behalf upon motions made both at the conclusion of the Government's case and at the conclusion of all the evidence.
2. Error committed by the trial court in failing to to sustain appellant's motion to suppress Exhibit 1 made prior to the trial.
3. Error committed by the trial court in admitting Government's Exhibit 1 in evidence.

SPECIFICATION OF ERRORS

Specification of Error No. 1 (Assignment 4, R. p. 69)

Specification of Error No. 2 (Assignments 1 and 2, R. p. 68)

ARGUMENT**SPECIFICATION OF ERROR NO. 1****Assignment No. 4**

The Court erred in denying the motion of appellant for a directed verdict of not guilty, and renewed at the close of all the evidence, because there was no substantial or competent evidence to sustain the charge upon which the verdict was rendered. (Appendix, p. 1.)

This Court has on numerous occasions held that the possession of smoking opium carries with it the presumption that it was unlawfully imported into the United States. In no case, however, has the question been squarely raised as it is in this case. While the chemist identified the same as smoking opium, he further testified that he could not tell whether this had been manufactured in the United States or not, as is shown by the testimony of Hugo Ringstrom. (R. 32.)

Of course, with Exhibit 1 out of the evidence, the Government had no case at all to submit to a jury, but this will be discussed under a separate heading.

SPECIFICATION OF ERROR NO. 2**Assignments 1 and 2**

If Wing had been taken before a United States Commissioner or tried to the Court without the finding

of any narcotics, no Commissioner would bind him over, no Grand Jury indict him, and no jury find him guilty. At the time the first search was made, no narcotics were found at all. (R. p. 25.) Under those circumstances no case, of course, was had. He had committed no offense in the presence of the officers and they did not have any reasonable ground to apprehend that a felony had been committed. Upon being taken to the garage, after he had been placed under arrest, not charged specifically, with any crime, and with no evidence upon which a conviction could be had for any offense, his car was again searched and the narcotics, being Exhibit 1, were found. This search was not an incident to an arrest, for no offense that the officers knew of had been committed. The subsequent search was for the purpose of discovering evidence upon which a conviction could be had. If, under all of these circumstances, narcotics had not been found, unquestionably Wing could have maintained, had he so desired, an action for false arrest based upon the evidence as set out in the trial and in the affidavits of the various officers. (*Agnello vs. U. S.*, 46 S. Ct. 4.)

The affidavits in support of the motion to suppress were pure hearsay and a motion to strike them was regularly and duly made on the ground of hearsay. (R. p. 61.)

Before officers can search without a search warrant they certainly must be in possession of such evidence as would be competent to establish probable cause be-

fore a Commissioner in making application for a search warrant.

“The evidence before the judge or Commissioner who issues the search warrant must be such as would be admissible on trial.” (*Giles vs. U. S.*, 284 F. 208.)

“The Commissioner must be furnished with facts—not suspicions, beliefs or surmises.” (*Veeder vs. U. S.*, 252 F. 414.)

A search warrant cannot be obtained on hearsay evidence. (*Wagner vs. U. S.*, 8 F. 2nd, 581.)

All searches and seizures made by customs or revenue officers must conform to the Fourth Amendment and must not conflict therewith. (*Wagner vs. U. S.*, 8 F. 2nd, 581.)

With this incompetent evidence out of the way, it is obvious that the officers did not have probable cause. If their suspicions were well founded, they should have gone to a United States Commissioner and requested the issuance of a warrant because they had under all the evidence, sufficient time in which to do so. (R. pp. 27, 29.) Certainly under evidence of this hearsay nature, no Commissioner would issue a search warrant. This is not like the *Husty* or *Carroll* cases, because in this case the automobile had been watched, under the testimony of the officers, for a period of over a month. They knew where it was kept, and they had followed it on different occasions. (R. p. 25.)

In the *Carroll* case the officers had personal knowl-

edge that Carroll was actively engaged in bootlegging and transporting liquor, they having had conversations with him with reference to purchasing liquor; in the instant case they had no such knowledge. In the *Carroll* case, Carroll was arrested on the Detroit-Grand Rapids highway, which was a road notorious because of its use by smugglers and bootleggers; in the instant case the defendant was arrested in the downtown shopping district of Seattle. In the *Carroll* case, Carroll, at the time of his arrest, was in the same automobile which he was driving at the time he made a deal to sell liquor to the officers; in the instant case, the officers had no knowledge that the defendant's car had ever been used for any unlawful purpose. In the case of *Husty vs. U. S.*, (282 U. S. 694) the officers had personal knowledge that Husty was a bootlegger and had been for a number of years, and had arrested him on two previous occasions for liquor violations; in the instant case, the officers were not acquainted with the defendant and knew nothing about him except hearsay and that he had had one conviction on a narcotic law violation several years ago. In the *Husty* case the officers had known his informant in business and socially for eight years; in the instant case the officers were not well acquainted with their alleged informant. In the *Husty* case two occupants of Husty's car jumped out of the car and ran away at the approach of the officers; in the instant case, of course, no such thing occurred to give the officers any probable cause to believe that a crime

was being, or had been, committed. In the case of *Stobble vs. U. S.* (91 F. 2nd 69), the officers had talked to and interviewed persons leaving the Stobble residence with narcotics in their possession and who informed the officers that they had purchased said narcotics from the Stobble woman; in the instant case the officers had no information that the defendant ever sold narcotics to anyone. In the *Stobble* case the officers saw Miss Stobble carrying a container such as is used for wrapping heroin, from her house to her car, and also at the time of seizure saw said container or package in her lap, fully exposed to view; in the instant case the officers saw nothing and had to search the car twice before they succeeded in finding one ounce of opium.

“Those lawfully in the country, entitled to use the public highways, have a right to free passage without interruption or search *unless there is known* to a competent officer, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.” (*Carroll vs. U. S.*, 267 U. S. 132.) (*Italics ours.*)

“In cases where the securing of a warrant is reasonably practicable, it must be used.” (*Carroll vs. U. S.*, 267 U. S. 122.)

In view of all of the evidence the court cannot escape the conclusions that the officers, at most, had nothing but hearsay and suspicion to warrant stopping the appellant, placing him under arrest and searching his car. (R. p. 32.) They did not have any evidence which they could have placed before a Commissioner which

would give the Commissioner probable cause to believe that the appellant was violating the law or transporting contraband. Furthermore, the officers knew where the appellant lived, knew his car and license number and were getting their alleged tips in ample time to have procured search warrants. (R. pp. 25, 27, 29.)

At the time the officers arrested appellant they were using three automobiles and had ample facilities to follow the appellant and also to obtain the necessary search warrant if they could have convinced a Commissioner that a search warrant should issue. (R. pp. 28, 31.)

We earnestly contend that in searching the appellant's car the officers acted arbitrarily and unlawfully and the court erred in not granting the appellant's motion for a directed verdict and motion to suppress the evidence.

Respectfully submitted,

JOHN F. GARVIN,

Attorney for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR INCLUDED UNDER SPECIFICATION NO. 1

4. The Court erred in not directing a verdict of not guilty for the defendant, Wing.

ASSIGNMENTS OF ERROR INCLUDED UNDER SPECIFICATION NO. 2

1. The Court erred in failing to grant defendant's motion to suppress.

2. The Court erred in admitting Government's Exhibit No. 1 in evidence.

No. 8650

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

J. CHARLES DENNIS,
United States Attorney.

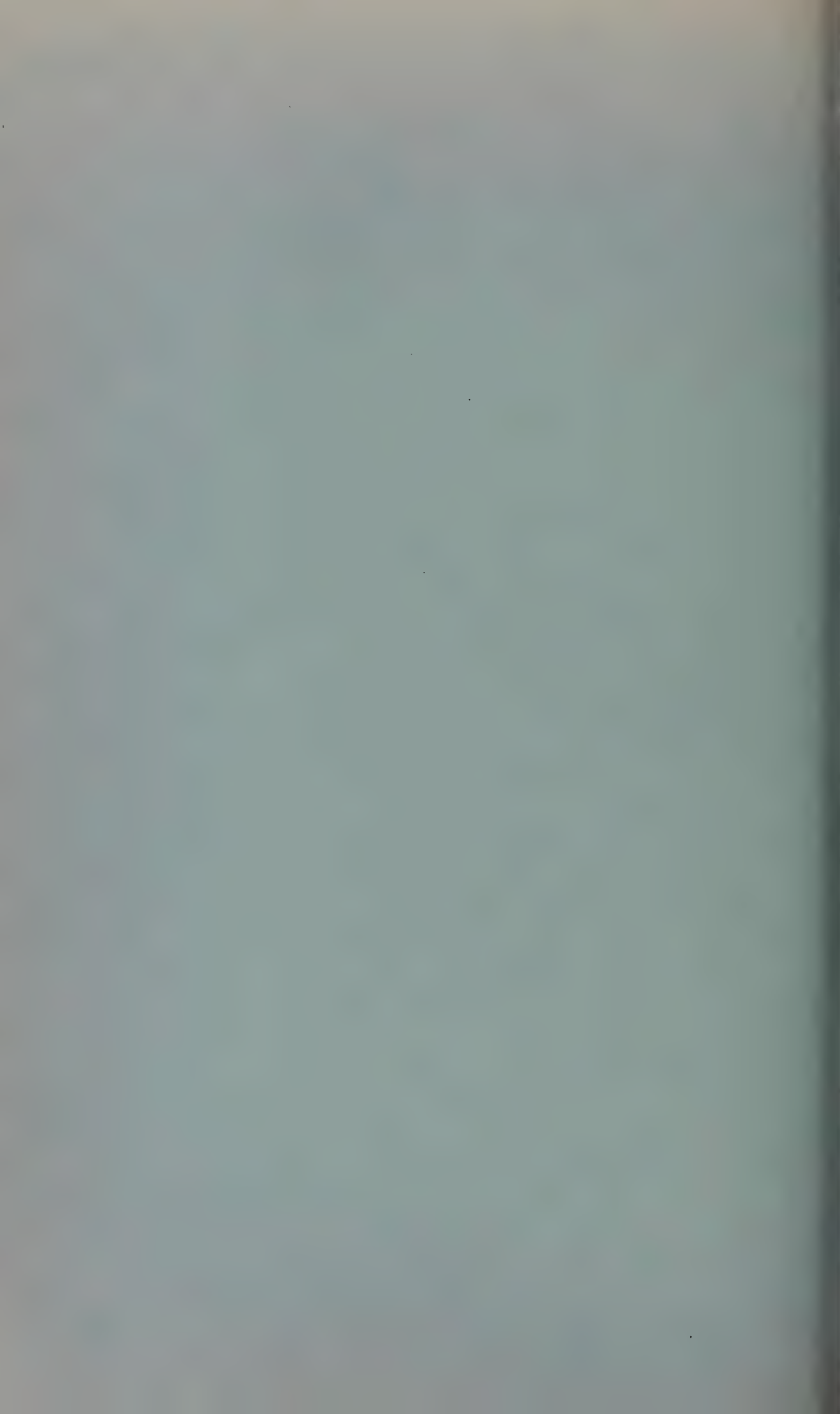
F. A. PELLEGRINI,
Assistant United States Attorney.
Attorneys for Appellee.

Office and P. O. Address:
226 Post Office Building, Seattle, Washington.

FILED

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PAUL F. O'BRIEN



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**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

LEONG CHONG WING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

In the instant cause the defendant Leong Chong Wing, alias Lew Ching Wing, alias Yue Sing, alias Yoe Sing, alias Yoe Sing Wing, together with a co-

defendant, was charged in two counts of the indictment (Tr. 2) with a violation of Section 174, Title 21 U. S. C. A. and Section 1593(b), Title 19 U. S. C. A. In count I of the indictment, it is charged that the said defendants did receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain derivative and preparation of opium, to wit, one ounce of opium prepared for smoking, which said opium the defendants knew had been imported into the United States contrary to law, in violation of Sec. 174, Title 21, U. S. C. A.

When the said cause was called for trial, count II of the indictment was upon motion of the appellee, dismissed and it will therefore not be necessary to consider this count of the indictment (Tr. 8).

Appellant Leong Chong Wing thereafter on the trial before a jury was convicted on count I of the indictment, the jury, upon motion concurred in by appellee, returning a directed verdict of "not guilty" as to the co-defendant Lyle G. Gray (Tr. 9). Appellant was thereupon sentenced to two years in the United States Penitentiary at McNeil Island, Washington, and to pay a fine of \$500.00 (Tr. 11).

ARGUMENT

In discussing the assignments of error, particular attention will be directed to the two specifications of error argued in the appellant's brief.

1. That the court did not err in denying appellant's motion for a directed verdict (Assignment of Error Number 4).

2. That the court did not err in denying appellant's motion to suppress or in admitting Government's Exhibit Number 1 in evidence (Assignments of Error Numbers 1 and 2).

I

THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT

The appellant's first specification of error (Tr. 68) is not meritorious for the reason that the admission in evidence of Government's exhibit number 1, coupled with the appellant's admission on the trial that he was the owner of and had possession of the smoking

opium (Tr. 37), is more than amply sufficient to support the conviction herein, particularly in view of the provisions of Section 174, Title 21, U. S. C. A., which provides in part as follows:

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909 c. 100, Sec. 2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)”

This Honorable Court has had occasion to construe the above quoted provision of Section 174, Title 21 U. S. C. A. in a number of cases giving full effect thereto, particularly in the case of *Morlen v. United States*, 13 F. (2d) 625, wherein, at page 626, this Court in an opinion written by Judge Hunt, stated as follows:

“Counsel for Morlen argues that the portion of the statute (42 Stat. 596, subd. (f)) which provides that, on a trial for the violation of subdivision c, whenever a defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the possession is satisfactorily

explained to the jury, raises a presumption that the person in possession was the importer of the drug, or, if it be established that the drug was imported, that the possessor had knowledge of its importation, but that the presumption cannot supply proof of the fact of the importation of the drug. Like argument was made in *Charley Toy v. United States* (C. C. A.) 266 F. 326, in *Ng Choy Fong v. United States*, 245 F. 305, 157 C. C. A. 497, and was considered in *Yee Hem v. United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904, where the Supreme Court held that it is not an illogical inference that opium found in this country after its importation has been prohibited has been unlawfully imported, and that a provision that possession of opium, in the absence of satisfactory explanation, creates a presumption of guilt is not unreasonable. The court said, 'By universal sentiment, and settled policy as evidenced by state and local legislation for more than a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned,' and held that the imposition upon one in possession of opium of the duty of rebutting or attempting to rebut the natural inference of unlawful importation or knowledge of it is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress. *Rosenberg et al v. United States* (C. C. A.) 13 F. (2d) 369 (June 7, 1926)."

See also *Hooper v. United States*, 16 F. (2d) 868; and *Parmagini v. United States*, 42 F. (2d) 721.

II

THE COURT PROPERLY DENIED APPELLANT'S
MOTION TO SUPPRESS AND PROPERLY AD-
MITTED IN EVIDENCE GOVERNMENT'S EX-
HIBIT NUMBER 1

Prior to the trial of the cause herein, the appellant by motion to suppress supported by affidavits executed by himself and the co-defendant Lyle G. Gray (Tr. 6, 42-44, 62-65) attacked the validity of the search of appellant's automobile and the seizure of certain opium found therein. The court overruled the motion and properly so. The facts and circumstances upon which the search and seizure were based are disclosed by the affidavits of the Customs and Narcotic officers (Tr. 44-61) and by the evidence adduced at the trial of the cause (Tr. 25-35), and briefly are as follows:

That the appellant Leong Chong Wing had theretofore and on or about March 23, 1931, in cause number 41286 in the United States District Court for the Western District of Washington, been convicted and

sentenced for a violation of the Narcotic Drugs Import and Export Act upon a plea of guilty (Tr. 36, 55-56). That the appellant at all times had the reputation of being a dealer in illicit narcotic drugs (Tr. 51, 55, 57). That on or about December 15, 1936, the Government officers received reliable information from an informant that the appellant had received an illicit shipment of opium, morphine and other narcotic drugs, and that the appellant was engaged in the sale of the said narcotic drugs in the city of Seattle (Tr. 51, 55, 57); that some of the Government officers had on prior occasions observed the appellant in the company of other known narcotic dealers who had previously been convicted, and that they had received numerous complaints of the appellant's activities in the illicit sale of narcotic drugs (Tr. 33, 51, 55, 57).

That thereafter, and on or about January 29, February 4th and February 12th, 1937, the officers received reliable information from an informant that the appellant would on said dates meet a white man for the purpose of effecting a sale and delivery of narcotic drugs, and that the appellant would be transporting the said narcotic drugs in his automobile (Tr. 31, 52,

59). That the Customs officers were acquainted with the informant and had on prior occasions received information from him which the officers always found reliable (Tr. 30, 33, 53). That on January 29th, acting on the said information, the officers observed the appellant leave his home at 3802 Dakota Street, driving an Oldsmobile sedan owned by the appellant, and followed the appellant to the corner of Third Avenue and Lenora Street in the city of Seattle, at which point the officers observed a white man get into the automobile of the appellant, the said white man being later identified as the co-defendant Lyle G. Gray (Tr. 25, 30, 45, 59). That the appellant Leong Chong Wing thereupon drove his automobile in a northerly direction along Third Avenue to Bell Street; then east on Bell Street to Fourth Avenue and south on Fourth Avenue to Virginia Street. That on February 4th the Government officers again received reliable information from the informant that the appellant would effect the sale of narcotic drugs to a white man; that they followed the appellant Leong Chong Wing, observing him meet Lyle G. Gray, who again entered the car of the appellant Leong Chong Wing in the

vicinity of Second Avenue and Virginia Street in the city of Seattle; that defendant Lyle G. Gray entered appellant Leong Chong Wing's automobile, at which time the appellant Leong Chong Wing proceeded to the vicinity of Third Avenue and Stewart Street in the city of Seattle, and the defendant Lyle G. Gray alighted from the automobile, the appellant Leong Chong Wing then proceeding to drive his automobile to the Chinatown district in the city of Seattle (Tr. 48). That on February 12, 1937, Government officers again received reliable information from an informant that the appellant Leong Chong Wing would meet a white man for the purpose of effecting a delivery of narcotics; that on the said date they observed the appellant Leong Chong Wing drive his automobile in the city of Seattle to the vicinity of Third Avenue and Lenora Street in the city of Seattle, at which time the defendant Lyle G. Gray entered the automobile of the appellant Leong Chong Wing (Tr. 25, 28, 30). The officers apprehended said defendant Lyle G. Gray and appellant Leong Chong Wing and placed them under arrest and proceeded to search the automobile of the appellant Leong Chong Wing for nar-

cotic drugs. That as a result of the search there was found in the automobile a glass jar containing one ounce of opium prepared for smoking (Tr. 26, 28, 46). The affidavits and evidence further disclosed that after the search of the said automobile the appellant Leong Chong Wing admitted that the opium belonged to him but stated that it was for his own personal use (Tr. 27, 29, 35, 54). The Government officers did not have a search warrant for the search of the appellant's automobile, and did not have a warrant for the arrest of the appellant.

The Supreme Court of the United States has consistently held that the Fourth Amendment to the Constitution of the United States does not denounce all searches and seizures, but only such searches and seizures as are unreasonable, and that the true rule is:

“That if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.”

Carroll v. United States, 267 U. S. 132.

That the officers in the instant case had a belief reasonably arising out of the circumstances known to them that the automobile of the appellant contained contraband subject to seizure and destruction under the law, is conclusively apparent from the facts heretofore set forth, and when these facts are interpreted in the light of a recent decision of the Supreme Court, entitled *Husty v. United States*, 282 U. S. 694, the officers undoubtedly had probable cause upon which to search the automobile of the appellant.

In the *Husty* case the facts as stated in the opinion are briefly as follows:

The officers knew the appellant Husty to be a "bootlegger" for a number of years prior to the arrest of the petitioners. That on two previous occasions the appellant Husty was arrested for violations of the National Prohibition Act, both arrests resulting in conviction and the second in imprisonment. On the day of petitioners' arrest, an officer testified he had received from an informant, information over the telephone that Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets. The officer further

testified that he was acquainted with the informant, had come in frequent contact with him and that the informant had given similar information on prior occasions which had always been found to be reliable. That acting on this information, the officer found one of the cars described, at the point indicated, and unattended. Later, petitioners and a third man entered the car. That petitioner Husty had started the car when he was stopped by the officers. Petitioner Laurel and the third man fled, and the latter escaped. The officers, believing the car contained intoxicating liquor, searched it, and found it contained eighteen cases of whiskey.

The Supreme Court in an opinion written by Justice Stone, at page 700, stated as follows:

“The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll v. United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected il-

legal act. *Dumbra v. United States*, 268 U. S. 435, 441; *Carroll v. United States*, *supra*. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra v. United States*, *supra*; *Stacey v. Emery*, 97 U. S. 642, 645.

“Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car nor how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll v. United States*, *supra*.”

See also *Van Eeckhoutte v. United States*, 79 F. (2d) 827; *Turner v. United States*, 73 F. (2d) 838; *Lambert v. United States*, 282 Fed. 413; *Milam v. United States*, 296 Fed. 629; *Green v. United States* 289 Fed. 236; *Stobble v. United States*, 91 F. (2d) 69.

The right to search the appellant's automobile and the validity of the seizure of the narcotics are not dependent on the right to arrest if the contents of the automobile are contraband and offend against the law. In *Carroll v. United States*, *supra*, at page 158, Justice Taft, in disposing of this contention, stated as follows:

"The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had

against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

“This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform.”

Section 173, Title 21 U. S. C. A. specifically declares opium prepared for smoking to be contraband and subject to forfeiture.

It is not necessary in order to establish probable cause as contended in appellant's brief that the Government officers should have had before them legal evidence of the suspected illegal act. It is sufficient if the apparent facts which came to their attention would lead a reasonably discreet and prudent man to believe that a narcotic drug was illegally possessed in the appellant's automobile.

Husty v. United States, supra.

Carroll v. United States, supra

Dumbra v. United States, 268 U. S. 435, 441.

And it is undoubtedly evident from the facts set forth in the affidavits of the officers involved in the search and seizure and from the facts admitted in evidence on the trial of this case, that a reasonably discreet and prudent man, under the circumstances, could only believe that a narcotic drug was illegally possessed in the appellant's automobile.

It is therefore submitted that the trial court did not err in denying the appellant's motion to suppress, in admitting in evidence Government's Exhibit number 1, or in refusing to grant a directed verdict, and the decision of the trial court herein should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,

United States Attorney

F. A. PELLEGRINI,

Assistant United States Attorney.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, Bankrupt,
Plaintiff,

vs.

B. F. BAUM, MARGARET D. KLEINSCHMIDT, as
Administratrix of the Estate of Walter Granger Klein-
schmidt, deceased, MARGARET D. KLEIN-
SCHMIDT, individually, et al.,
Defendants.

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Kleinschmidt, de-
ceased,
Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, a bankrupt,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, Bankrupt,
Plaintiff,

vs.

B. F. BAUM, MARGARET D. KLEINSCHMIDT, as
Administratrix of the Estate of Walter Granger Klein-
schmidt, deceased, MARGARET D. KLEIN-
SCHMIDT, individually, et al.,
Defendants.

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Kleinschmidt, de-
ceased,
Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, a bankrupt,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

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Names and Addresses of Solicitors.

For Appellant Margaret D. Kleinschmidt, as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased:

PILLSBURY, MADISON & SUTRO, Esqs.,

Standard Oil Building,

San Francisco, California.

For Appellee Ernest U. Schroeter, as Trustee in Bankruptcy of the Estate of B. F. Baum, a Bankrupt:

RUPERT B. TURNBULL, Esq.,

433 South Spring Street,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, CENTRAL DIVISION

_____)	
ERNEST U. SCHROETER, as)	
Trustee in Bankruptcy of the Es-)	
tate of B. F. Baum, Bankrupt,)	
)	
Plaintiff,)	
)	
vs.)	
	)	Equity No. 959-C
B. F. BAUM, MARGARET D.)	
KLEINSCHMIDT, as Adminis-)	
tratrix of the Estate of Walter)	
Granger Kleinschmidt, Deceased,)	
MARGARET D. KLEIN-)	
SCHMIDT, individually, et al,)	
)	
Defendants.)	
_____)	

CITATION

United States of America) ss.

The President of the United States of America

To Ernest U. Schroeter, as Trustee in Bankruptcy
of the Estate of B. F. Baum, a bankrupt—

GREETINGS:

You are hereby cited and admonished to be and appear
at the United States Circuit Court of Appeals for the

Ninth Circuit to be holden at the City and County of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Southern District of California, Central Division, wherein Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, is appellant and you are appellee, to show cause, if any there be, why the decree and judgment rendered against the said appellant dated and entered February 23, 1937, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable George Cosgrave, Judge of the District Court of the United States in and for the Southern District of California, this 19th day of March, 1937.

Geo Cosgrave
United States District Judge

[Endorsed]: Receipt of a copy of this Citation is hereby admitted this 19th day of March, 1937. Rupert B. Turnbull Attorney for Ernest U. Schroeter, as Trustee, etc. Filed Mar 20 1937 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION

ERNEST U. SCHROETER as)		
Trustee in Bankruptcy of the)		
Estate of B. F. Baum, Bankrupt)		
	)	In Equity
Plaintiff)		No. 959-C
)	
vs	)	BILL IN EQUITY
	)	TO RECOVER
B. F. BAUM MARGARET D.)		AVAILS OF
KLEINSCHMIDT as Adminis-)		SALES OF
tratrix of the Estate of Walter)		CONCEALED
Granger Kleinschmidt, Deceased;)		PERSONAL
MARGARKET D. KLEIN-)		PROPERTY
SCHMIDT individually; JOHN)		AND TO
DOE RICHARD ROE FIRST)		COMPEL
COMPANY, a corporation SEC-)		ACCOUNTING.
OND COMPANY, a corporation)		
)	
Defendants)		

TO THE HONORABLE JUDGES OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA:

Comes now Ernest U. Schroeter, Trustee in Bank-
ruptcy of and for the Estate of B. F. Baum, Bankrupt,
a citizen of the State of California and residing in the
City of Los Angeles in the State of California, in the
Southern District thereof, and for his cause of complaint
against the above named defendants and each of them
respectfully shows this Honorable Court and alleges:

I.

That the plaintiff herein, Ernest U. Schroeter, is the duly elected, qualified and acting Trustee in Bankruptcy of and for the Estate of B. F. Baum, Bankrupt, and is a resident and a citizen of the State of California, residing in the City of Los Angeles, County of Los Angeles and the Southern District of California. That B. F. Baum, whose full name is Benjamin F. Baum, was adjudicated a bankrupt on his voluntary petition in bankruptcy on the 6th day of November, 1931; that this court duly made, gave and entered its decree adjudicating said Benjamin F. Baum a bankrupt on November 6, 1931; that at the time of the said adjudication of Benjamin F. Baum, Walter Granger Kleinschmidt and Benjamin F. Baum were co-partners and had been continuously for more than six months prior to the date of such adjudication. That said Benjamin F. Baum and Walter Granger Kleinschmidt continued to be co-partners thereafter and up to the time of the death of Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt departed this life and became deceased in the month of February, 1936.

II.

That this is a suit in equity brought under Sections 70 and 70 E of the Bankruptcy Act of the United States of 1898 and amendments thereto, to set aside and void transfers of property consisting of the interest of the bankrupt in and to certain mining properties hereinafter described, which property was transferred by the bankrupt to Walter Granger Kleinschmidt subsequent to the filing of the voluntary bankruptcy of Benjamin F. Baum, and which transfer was made for the purpose of con-

cealing the property from the creditors of Benjamin F. Baum, and which property was taken, retained and held by Walter Granger Kleinschmidt in his name until after the primary administration of the bankrupt's estate, to-wit, the estate of Benjamin F. Baum, and thereupon re-conveyed to Benjamin F. Baum, and through the acts of said Benjamin F. Baum and Walter Granger Kleinschmidt, concealed from creditors of Benjamin F. Baum and the trustee in bankruptcy thereof and from the court administering said bankrupt's estate. This is an action to recover the value of said property so transferred in violation of Section 2957, Division 3, part 4, Title 14, Chapter 2, Article 3, of the Civil Code of California, and to compel an accounting by the defendants of all proceeds derived from the sale of the interest of the bankrupt, Benjamin F. Baum, income derived from the operation of the mining property, and for such other relief as to this court may seem just and equitable to grant.

III.

Plaintiff alleges that upon the death of Walter Granger Kleinschmidt, Margaret D. Kleinschmidt as the surviving widow of the deceased, filed her application for letters of administration upon the estate of Walter Granger Kleinschmidt, deceased, and thereafter, on the 16th day of April, 1936, letters of administration were duly, regularly made, given, granted and issued to the defendant Margaret D. Kleinschmidt, on an order duly made by the Superior Court of the State of California in and for the County of Santa Clara. Thereupon Margaret D. Kleinschmidt qualified in the manner required by law and in the manner required by the order appointing her as such administratrix, and on the 20th day of April, 1936 be-

came and was and has been at all times since said date and now is the duly appointed, qualified and acting administratrix of the estate of Walter Granger Kleinschmidt, deceased. That Margaret D. Kleinschmidt is the widow of Walter Granger Kleinschmidt and the sole heir at law of Walter Granger Kleinschmidt.

IV.

That on the 21st day of April, 1936, plaintiff made and executed his creditor's claim which he served upon Margaret D. Kleinschmidt as administratrix of the estate of Walter Granger Kleinschmidt, deceased, and filed with her a creditor's claim made pursuant to the law of the State of California requiring the making of a written creditor's claim, the presentation thereof and the filing thereof as a condition precedent to the commencement of an action against the estate of a deceased person. That said creditor's claim was and is in the form, letters, words and figures as is attached hereto, a copy marked "Exhibit A." Said exhibit is made a part of this bill by reference and incorporated herein as if fully set forth in this pleading. That at the time of the making, serving and filing of said creditor's claim there was also attached thereto a certified copy of the order of this, the District Court of the United States, for the Southern District of California, Central Division, appointing the claimant, Ernest U. Schroeter, as trustee in bankruptcy of the estate of Benjamin F. Baum, bankrupt, and also a certificate by the clerk of this, the District Court of the United States, for the Southern District of California, Central Division, certifying to the fact of the filing of the bond upon qualification given by the claimant, and of the approval by the court of such bond.

V.

And that for more than thirty days prior to the filing of the voluntary bankruptcy petition and the adjudication of Benjamin F. Baum as a bankrupt thereon on the 6th day of November, 1931, and at the time of the filing of said petition and at the time of the adjudication and at the time of the filing of his bankruptcy schedules, Benjamin F. Baum was the owner of an undivided one-half interest in and to a group of mining claims with the water rights appurtenant thereto, commonly known as the Camp Rock Mines situate in the Belleville Mining District in the County of San Bernardino, State of California, and within this judicial District. That said property was and is more particular known and described as:

Royal Placer Claim No. 1, as per description recorded in Book 171, page 64, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 2, as per description recorded in Book 171, Page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 3, as per description recorded in Book 171, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 4, as per description recorded in Book 179, page 65, Mining Records, County of San Bernardino, California

Royal Placer Claim No. 5, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California

Royal Placer Claim No. 6, as per description recorded in Book 171, page 67, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 7, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California

Royal Placer Claim No. 8, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 9, as per description recorded in Book 171, page 69, Mining Records, County of San Bernardino, California

Gold Junction Quartz Claim, as per description recorded in Book 168, page 189, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 1, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California

Gold Bar Claim No. 2, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California;

all of said property being situate in the County of San Bernardino, in the Belleville Mining District State of California;

which property was then and there on the date of bankruptcy, November 6, 1931, and at all the times thereafter and now, of a value of Fifty Thousand Dollars (\$50,000.00)

The plaintiff herein, your petitioner, alleges that immediately prior to the filing of the voluntary petition in bankruptcy by Benjamin F. Baum and in contemplation of such proceeding, Benjamin F. Baum and Walter Granger Kleinschmidt conspired and confederated together one with the other, and with the defendants John Doe,

Richard Roe, First Company, a corporation, and Second Company, a corporation, to defeat, defraud and place beyond the knowledge and the reach of the creditors of Benjamin F. Baum that certain property of the bankrupt, Benjamin F. Baum, hereinbefore referred to as the mining property in the Belleville Mining District, San Bernardino County, California. That as a part of said conspiracy and to carry out and complete the same, and in anticipation of the effect of said bankruptcy petition of Benjamin F. Baum, Benjamin F. Baum, without consideration of any kind, without the passing to him or to his estate of anything of value, conveyed in writing all of his right, title and interest in and to said mining properties, claims, water rights, placer and lode claims and interests, to Walter Granger Kleinschmidt, and Walter Granger Kleinschmidt accepted and took said conveyance and promised and agreed to hold and retain the same for the sole use and benefit of Benjamin F. Baum, and agreed to hold and retain the same until such time as Benjamin F. Baum should have completed his bankruptcy proceeding in this court, and until said Benjamin F. Baum should have been fully examined by his creditors in the bankruptcy proceeding and by the court and the referee thereof in the bankruptcy proceeding, and until Benjamin F. Baum should have obtained his discharge in bankruptcy in said proceeding. It was then and there agreed that upon the happening of such events and after the discharge in bankruptcy of Benjamin F. Baum, Walter Granger Kleinschmidt would, on request, reconvey said undivided one-half interest in and to said mining properties and rights and water rights and locations to Benjamin F. Baum. That said conveyance was made on or about the 7th day

of April, 1932. That Benjamin F. Baum filed his voluntary petition in bankruptcy in this court and was adjudicated thereon, and at the time of the filing of his petition he accompanied the same in triplicate with his schedules consisting of a sworn, signed statement purporting to show all of his debts and all of his assets of every kind and description. That said schedules did not disclose any interest, past, present or future, of Benjamin F. Baum in and to the said mining and water rights theretofore conveyed as aforesaid to Walter Granger Kleinschmidt. That the bankrupt, Benjamin F. Baum, was examined by this court, in the bankruptcy division thereof, and did not disclose to the court, the trustee or to his creditors that he had any interest in and to any of the mining properties, mining rights, water locations or any of the property in the complaint above referred to. The trustee in bankruptcy did not discover that the bankrupt, Benjamin F. Baum, had been the owner of any property, and took possession of no property, and brought no action to recover any property. Benjamin F. Baum applied for and obtained his discharge in bankruptcy and the administration of his estate as a bankrupt was closed on or about the 27th day of June, 1933. That thereafter, and approximately thirty days thereafter, Benjamin F. Baum demanded of and from Walter Granger Kleinschmidt the reconveyance to him of his interest in and to the mining properties and water rights hereinbefore described and Walter Granger Kleinschmidt, without consideration of any kind passing to him, but pursuant to and in compliance with his agreement theretofore made and hereinbefore pleaded, did make a conveyance of an undivided one-half interest of said herein described min-

ing and water properties to Benjamin F. Baum and did deliver the same to Benjamin F. Baum. Thereupon, Walter Granger Kleinschmidt and Benjamin F. Baum, as the joint owners of said property, sold and disposed of the same to a purchaser in good faith who paid therefor to Walter Granger Kleinschmidt for the benefit of Walter Granger Kleinschmidt and Benjamin F. Baum, the sum of Fifty Thousand Dollars (\$50,000.00). That thereafter and for the first time, on or about the 2nd day of January, 1936, the transaction and the nature thereof was called to the attention of creditors of Benjamin F. Baum, and, on petition duly had, this court on the 3rd day of January, 1936, reopened the estate of Benjamin F. Baum for the purpose of administering the assets so concealed, to-wit, the property hereinbefore alleged to have been wrongfully and fraudulently conveyed and reconveyed. That upon said reopening, Ernest U. Schroeter, who had originally been the trustee in the original primary bankruptcy proceeding, was re-elected and re-appointed trustee in bankruptcy of Benjamin F. Baum, and qualified as such by giving his bond and having the same approved, which order approving such bond was made on the 21st day of January, 1936. That the date of the order reopening such bankruptcy proceeding of Benjamin F. Baum was under order of this court the 3rd day of January, 1936. That at the time of the death of Walter Granger Kleinschmidt he had not paid over to Benjamin F. Baum the half interest of Benjamin F. Baum in and to such funds received from the sale of said mining and water properties as hereinbefore described, and Walter Granger Kleinschmidt had in his possession, under his control, and the estate of Walter Granger Klein-

schmidt, deceased, and Margaret D. Kleinschmidt as administratrix thereof, have as an asset of the estate of said decedent, and under their control, care and custody, sums of money the exact amount of which is unascertainable and unknown to the plaintiff at this time, but a sum in excess of Ten Thousand Dollars (\$10,000.00) in cash, which is the interest of Benjamin F. Baum as the avails of the sale of said mining and water properties as originally made for \$50,000.00, and which said sum of \$10,000 or more is yet undistributed. That the estate of Benjamin F. Baum is entitled to such funds and to an accounting concerning all of the moneys received from the sale of said mining property. Your petitioner, the plaintiff herein, alleges that the exact amount of money paid by Walter Granger Kleinschmidt during his life to Benjamin F. Baum on account of the half-interest of Benjamin F. Baum has not been ascertained. Your petitioner, the plaintiff, alleges that no part of the \$25,000.00 representing the half interest of Benjamin F. Baum, was ever paid to the estate of Benjamin F. Baum, bankrupt, the trustee thereof, nor to the creditors thereof, and that said sum of \$25,000.00 was actually received in cash by Walter Granger Kleinschmidt during his lifetime and after the filing of the voluntary petition of Benjamin F. Baum and the judgment of this court adjudicating Baum a bankrupt.

VI.

That the acts of the said Benjamin F. Baum and Walter Granger Kleinschmidt defrauded and prevented the payment to creditors of Benjamin F. Baum through the medium of his estate in bankruptcy and through the medium of the administration of this court, of any dividend to creditors in the matter of Benjamin F. Baum,

bankrupt. Petitioner alleges that there were creditors of Benjamin F. Baum in existence unpaid; that said creditors were unsecured creditors at the time of the conspiracy and confederation hereinbefore alleged, at the time of the making of the conveyances complained of, and at the time of the filing of the voluntary bankruptcy petition of Benjamin F. Baum and the adjudication of this court thereon. That said creditors and each of them have received and have been paid no dividend out of the estate of Benjamin F. Baum; that there came into the hands of the trustee in bankruptcy in the original primary case no funds out of which creditors could, might have been or were paid, and that upon the reopening of this estate no money, property or thing of value has come into the possession of the present trustee, the plaintiff herein. That there have existed at all times mentioned in this complaint and now exist many substantial unsecured creditors of Benjamin F. Baum who have filed and had allowed in the matter of Benjamin F. Baum, bankrupt, their respective claims as creditors, and upon which they have been paid no dividend or thing of value. That at the time of the conveyance of the interest of Benjamin F. Baum to Walter Granger Kleinschmidt of the mining properties hereinbefore referred to, said Benjamin F. Baum was indebted to said various unsecured creditors holding provable claims in excess of \$28,268.43, among others, including the following:

Thomas Haverty Co.	Claim filed 11/30/31	\$3,946.05
Bank of America	“ “ 12/12/31	9,383.75
J. D. Minister	“ “ 1/ 2/32	1,279.88
Musto-Keenan Co.	“ “ 1/ 4/32	43.00

Emil Brown & Co.	“	“	1/ 4/32	2,944.40
Hartford Accident & Indem. Co.	“	“	2/23/32	3,218.78
E. W. Robinson Truck Co.	“	“	4/ 6/32	814.12
Cudahy Packing Company	“	“	4/25/32	6,558.45
C. E. Spencer	“	“	11/25/31	80.00

That as to the aforesaid named creditors and to the other unsecured creditors of the bankrupt, Benjamin F. Baum, the said conveyance and the arrangement and agreement between Walter Granger Kleinschmidt and Benjamin F. Baum and others constituted both a preference and a fraud, and that the bankrupt had no other property with which to pay his liabilities in full. That at the time of the taking of the property by Walter Granger Kleinschmidt, to-wit, by the conveyance hereinbefore referred to, the said Walter Granger Kleinschmidt knew that said Benjamin F. Baum was insolvent, knew he had no property other than the property conveyed to him, Walter Granger Kleinschmidt, with which to pay his debts, and during all the times from the date of said original conveyance by Benjamin F. Baum to Walter Granger Kleinschmidt, and up to and including the time of the reconveyance thereof of Walter Granger Kleinschmidt to Benjamin F. Baum, the said Kleinschmidt knew of the existence of said bankruptcy proceeding, knew of the failure of Benjamin F. Baum to disclose the knowledge of such transfer to the trustee in bankruptcy or to this court, knew of the non-payment of any dividend to creditors out of the estate of Benjamin F. Baum, and knew of and became a party to the concealment of such facts from the trustee in bankruptcy and from this court.

VII.

That the estate of Walter Granger Kleinschmidt, deceased, and Margaret D. Kleinschmidt as administratrix thereof, has rejected the claim of the plaintiff as filed with the administratrix and in said estate and no part thereof has been paid.

WHEREFORE, the plaintiff prays judgment against the defendants:

(1) For a money judgment in the sum of Twenty-five Thousand Dollars (\$25,000.00), together with interest at the rate of seven per cent (7%) per annum from the 7th day of April, 1932.

(2) That the defendants be required to account to the plaintiff for all the moneys received from the sale of the mining and water properties hereinbefore in this complaint described up to and including the \$25,000.00 interest of the bankrupt, Benjamin F. Baum, in and to which interest the plaintiff claims as an asset of the estate of Benjamin F. Baum, bankrupt.

(3) That the defendants be required to answer in writing specifically the interrogatories to be herein filed by this plaintiff and served upon the defendants in accordance with Equity Rule No. 58, copies of which interrogatories are attached to this bill of complaint.

(4) That the plaintiff be given such other and further relief as to the court may seem just and equitable in the premises.

(5) That plaintiff have and recover all of his costs and disbursements herein.

(6) MAY IT PLEASE THIS HONORABLE COURT to issue its subpoena directed to the said defendants commanding them on a day certain to appear and answer this bill of complaint and to abide by the orders and decrees of this court thereon.

ISAAC PACT
RUPERT B. TURNBULL
ISAAC PELTON
CLORE WARNE
MILTON M. BLACK

BY Rupert B. Turnbull
Solicitors for Plaintiff

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS
COUNTY OF LOS ANGELES)

Ernest U. Schroeter, being by me first duly sworn, deposes and says that he is the duly elected, qualified and acting Trustee in Bankruptcy in the within action; that he has read the foregoing Bill in Equity and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

Ernest U. Schroeter

Subscribed and sworn to before me this 17th day of June, 1936.

[Seal]

Florence Robinson

Notary Public in and for the County of Los Angeles,
State of California

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE
COUNTY OF SANTA CLARA

IN the matter of the Estate of)
) CREDITOR'S
 WALTER GRANGER KLEIN-) CLAIM
 SCHMIDT)
 Deceased.)

April 21, 1936

The undersigned, a creditor of Walter Granger Kleinschmidt, deceased, herewith presents his claim against the estate of said deceased, with the necessary vouchers, to Margaret D. Kleinschmidt as Administratrix of said estate, for approval, as follows:

ESTATE OF Walter Granger Kleinschmidt, deceased,
TO Ernest U. Schroeter as Trustee in Bankruptcy of Dr
the Estate of Benjamin F. Baum, Bankrupt.

To one-half of the purchase price of those certain mining properties in the Belleville Mining District, San Bernardino County of California, known as the Camp Rock Mine, which property was owned by Walter Granger Kleinschmidt and Benjamin F. Baum jointly at all times since the acquisition of the property prior to the bankruptcy of Benjamin F. Baum in 1932; was owned by Walter Granger Kleinschmidt and Benjamin F. Baum jointly at all times since said date, and which property was sold by Walter Granger Kleinschmidt and Benjamin F. Baum for the sum of \$50,000.00

This claim is based first on the ground that Walter Granger Kleinschmidt, at the request of the bankrupt, Benjamin F. Baum, took a conveyance of the interest of Benjamin F. Baum and retained the same at the time Benjamin F. Baum filed his voluntary petition in bankruptcy, during all of the period of administration of the Estate of Benjamin F. Baum, a bankrupt; and after the closing of the Estate of Benjamin F. Baum, at the request of Benjamin F. Baum reconveyed to Benjamin F. Baum an undivided one-half interest in said property. That the said conveyance was made for the purpose of concealing the assets of Benjamin F. Baum, particularly his interest in the Camp Rock Mine, from the creditors of Benjamin F. Baum. That the creditors of Benjamin F. Baum and his bankrupt's estate and Ernest U. Schroeter as the Trustee in Bankruptcy upon reopening, as well as the original Trustee in Bankruptcy, have not collected any interest or share of Benjamin F. Baum in and to said property. This claim is also based on the ground that funds from the purchase price of said Camp Rock Mine now remain in the custody, under the control or in the care of the Estate of Walter Granger Kleinschmidt and the Administratrix thereof. The amount of this claim is the sum of \$25,000.00, for which demand is made upon the estate of the deceased and the Administratrix thereof for payment. There is attached to and submitted with this claim a certified copy of the order appointing said claimant as Trustee in bankruptcy; also a certificate of the filing of his bond upon qualification as such Trustee.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION

ERNEST U. SCHROETER)
As Trustee in Bankruptcy of)
the Estate of B. F. Baum,)
Bankrupt)

vs)
)

B. F. BAUM MARGARET)
D. KLEINSCHMIDT as Ad-)
ministratrix of the Estate of)
Walter Granger Kleinschmidt,)
Deceased; MARGARET D.)
KLEINSCHMIDT individu-)
ally; JOHN DOE RICH-)
ARD ROE FIRST COM-)
PANY, a corporation SEC-)
OND COMPANY, a corpo-)
ration)

In Equity
No.

INTERROGATORIES

Defendants

1. Please make a list of the dates and amounts re-
ceived from the sale of the mining property in Belleville
Mining District, County of San Bernardino, State of

California, which property is more particularly described in the complaint.

2. State what, if any, of the \$50,000.00 purchase price is still in escrow and undelivered.

3. State the name of the escrow agent or stake holder and give its or his address.

4. What amount of the purchase price of said mining property above referred to has been actually paid to Benjamin F. Baum or his order?

5. What is the estimated gross value of the estate of Walter Granger Kleinschmidt, deceased?

6. What is the remaining amount of the purchase price of the mining property above described, if any, unpaid?

[Endorsed]: Filed Jun. 18, 1936 R. S. Zimmerman,
Clerk By L. Wayne Thomas, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ANSWER TO BILL IN EQUITY

Comes now MARGARET D. KLEINSCHMIDT as administratrix of the estate of WALTER G. KLEINSCHMIDT and MARGARET D. KLEINSCHMIDT individually, and in Answer to the Bill in Equity of the above named plaintiff, and to the complaint therein contained, respectfully shows this Honorable Court, and admits, denies and alleges as follows, to-wit:

I.

Defendant alleges that she has no information nor belief which would enable her to answer certain allegations in Paragraph 1, of said complaint set forth, and basing her denial on such lack of information and belief, denies that ERNEST SCHROETER, is the duly elected, qualified and/or acting Trustee in bankruptcy. Defendant denies that on November 6, 1931, or at any other time or at all, save and except as may be hereinafter specifically admitted and alleges, that said B. F. BAUM and WALTER GRANGER KLEINSCHMIDT, were co-partners, or had been continuously for a period of six (6) months continuously prior to the date of adjudication, or at all. Defendant denies that B. F. BAUM and said WALTER GRANGER KLEINSCHMIDT, continued to be or ever were co-partners up to the time of the death of WALTER GRANGER KLEINSCHMIDT, or at all; Defendant admits and alleges that she is informed and believes and upon said information and belief, alleges that during the time between April 16, 1931, and July 16, 1931, that B. F. BAUM and said WALTER GRANGER KLEIN-

SCHMIDT and others were jointly engaged in the purchase of certain mining claims and locations in said complaint described, but that any and all such relations were terminated and extinguished on and after by reason of the failure on the part of B. F. BAUM to make such payments as were required to allow said B. F. BAUM to participate in and remain in such joint venture.

II.

In answer to Paragraph II, of said complaint, defendant denies that B. F. BAUM had any interest in and to any mining property at any time subsequent to July 16, 1931, or at the time of his adjudication in bankruptcy; denies that said interest, if any, was transferred to WALTER GRANGER KLEINSCHMIDT, subsequent to the filing of the voluntary bankruptcy, or at all, save by operation of law; for the purpose of concealing the property or any property from the creditors of B. F. BAUM, or at all, except for a purpose of clarifying any full and complete title in and to said mining property, which full and complete title, if any, had theretofore passed to WALTER GRANGER KLEINSCHMIDT, by operation of law; denies that any interest in said property was taken, retained and/or held by WALTER GRANGER KLEINSCHMIDT, or any one else, in his name, or at all; denies that through the, or any act of said BENJAMINE F. BAUM and/or WALTER GRANGER KLEINSCHMIDT, any assets were concealed from the creditors of the estate of BENJAMINE F. BAUM, and/or from the Trustee in bankruptcy, and/or from the Court in administering the defendants bankruptcy estate, or at all.

III.

In answer to Paragraph IV of said petition, defendant denies that for more than thirty (30) days prior to the filing of the voluntary petition in bankruptcy and to the adjudication of defendant in bankruptcy, or at any other time, that B. F. BAUM was the owner of a one-half interest in and to the mining claims and/or water rights described in said complaint; denies, that at any time or at all since the 16th day of July 1931, that defendant was or is the owner of any interest in and to the above described premises; admits that prior to the 16th day of July, 1931, that defendant was or is the owner of a certain $26\frac{2}{3}$ interest in and to said property subject to the terms of a certain conditional sales contract for the purchase thereof, and alleges that the retention of said interest by said B. F. BAUM therein was conditional upon the payment each month of his pro rata share of the purchase price thereof.

Defendant denies that immediately prior to the filing of the bankruptcy petition, or at any other time, B. F. BAUM and WALTER GRANGER KLEINSCHMIDT, or B. F. BAUM and any other person conspired and/or confederated to defeat and/or place beyond the knowledge and/or each of the creditors of BENJAMIN F. BAUM, or any other person, thru certain property referred to in said complaint, or any other property. Defendant denies that as a part of any conspiracy, or to carry out or to complete any conspiracy, and/or in anticipation of the or any effect of any bankruptcy petition of BENJAMIN F. BAUM, and/or without consideration of any kind and/or without the passing to him, or to his estate any thing of value nor for any other

reason of any kind, nature or description, save and except for the clarification of the interest, if any, of WALTER GRANGER KLEINSCHMIDT, and to the property in said complaint described which interest had theretofore passed to said WALTER GRANGER KLEINSCHMIDT, by operation of law, conveyed any right, title and/or interest in and to any mining properties, claims, water rights, places and/or interest to WALTER GRANGER KLEINSCHMIDT, or to any other person; denies that WALTER GRANGER KLEINSCHMIDT, accepted and/or took said or any conveyance and/or promised and/or agreed to hold and/or retain the same or any for the sole or any use and/or benefit of defendant; denies that any agreement was ever entered into that WALTER GRANGER KLEINSCHMIDT was to hold and/or retain any property until said BENJAMIN F. BAUM, should have completed his bankruptcy proceedings or for any other period of time, or at all; denies that it was then and there, or at all, agreed that upon the or any happenings of and/or any event or at any other time, or at all, that WALTER GRANGER KLEINSCHMIDT, would upon request, or at any other time, or at all, reconvey, or convey said or any interest in and to said or any mining, or other property rights and/or location to defendant, or to any other person.

Defendant alleges that she has no information or belief concerning any conveyance made on April 8, 1932, and basing her denial on such lack of information that such or any conveyance was made on or about April 8, 1932.

Defendant denies that after said 27th day of June, 1931, or at any time, or at all, that B. F. BAUM de-

manded of or from WALTER GRANGER KLEINSCHMIDT, the, or any reconveyance to him, or to any other person of his, or any interest in and/or to the, or any mining properties and/or water rights with or without consideration passing to him, or any one else; denies pursuant to and/or in compliance with, or at all with said or any agreement or at all, did make any conveyance of an undivided one-half, or any interest of in and to said or any mining, and/or water properties; denies that any such conveyance was made or delivered to defendant; denies that thereupon or any other time, or at all, WALTER GRANGER KLEINSCHMIDT, and B. F. BAUM, or any other person other than said WALTER GRANGER KLEINSCHMIDT, and acting for himself alone sold and/or disposed of said property to any person; denies that any person paid or agreed to pay to WALTER GRANGER KLEINSCHMIDT, or agent, or otherwise than for himself alone, the sum of FIFTY THOUSAND AND NO/100 (\$50,000) Dollars, or any other sum, or at all.

Defendant admits that at the time of the death of said WALTER GRANGER KLEINSCHMIDT, there has not been paid over to defendant the or any half interest in and to such funds as were received from the sale of the mining properties hereinbefore described; defendant alleges that she has no information nor belief concerning the remainder of the allegations of Paragraph V, and bas-

ing her denial thereon, denies that said WALTER GRANGER KLEINSCHMIDT, had and MARGARET D. KLEINSCHMIDT, as administratrix, or otherwise, has as an asset of said estate and/or under their control, care, and custody any sums of money belonging to the defendant in excess of TEN THOUSAND AND NO/100 (\$10,000) Dollars, or any other sum or at all, but admits that she has been informed and believes that she has certain sums of money belonging to said defendant in an amount not known to her at this time; denies that the estate of BENJAMIN F. BAUM, bankruptcy, or any other person save and except BENJAMIN F. BAUM, individually is entitled to any funds or to any accounting concerning any or all sums of money received from the sale of said or any mining properties; Defendant denies that the sum of TWENTY FIVE THOUSAND AND NO/100 (\$25,000) Dollars, or any other sum or at all, were ever received by WALTER GRANGER KLEINSCHMIDT, on behalf of defendant, and admits that no part of any proceeds of the sale of any of the mining properties in said complaint described were ever paid to the bankruptcy estate of defendant.

V.

Denies that the or any acts of said B. F. BAUM and WALTER GRANGER KLEINSCHMIDT, defrauded and/or prevented the or any payment to creditors of defendant in any manner whatsoever. Defendant has no

information nor belief concerning certain allegations in said Paragraph V. alleged, and basing her denial thereon, denies that there were, or are any creditors of B. F. BAUM after his adjudication in bankruptcy; denies that there was any conspiracy and/or confederation as hereinbefore alleged; denies that there were, or are any creditors unsecured or otherwise at any time since the adjudication of bankruptcy of B. F. BAUM; denies that there have ever, or now do exist any creditors, substantial secured or otherwise since his adjudication in bankruptcy; alleges that any and all creditors are creditors of his bankruptcy estate only, and that all of the claims hereinbefore mentioned are and have been discharged in bankruptcy.

Defendant has now no information nor belief which would enable her to answer certain allegations in said complaint alleged, and basing her denial on that ground denies that at the time of the conveyance by defendant to WALTER GRANGER KLEINSCHMIDT, of any and all of his interest in and to the mining properties in said complaint alleged, which this defendant alleges was by operation of law, that B. F. BAUM was indebted to the creditors in said complaint set forth; denies that as to the creditors named in said complaint or as to any other creditors, or at all, that the said conveyance, or any con-

veyance and/or arrangement and/or agreement constituted any preference and/or fraud, but alleges that the or any interest which defendant had at the time of the conveyance by operation of law of said interest to WALTER GRANGER KLEINSCHMIDT, as aforesaid represented no tangible nor saleable interest, nor property rights; denies that at the time of said conveyance, which this defendant alleges to have been by operation of law, or at any other time prior to the adjudication in bankruptcy of B. F. BAUM, that WALTER GRANGER KLEINSCHMIDT, knew that B. F. BAUM was insolvent and/or that he had no other property with which to pay his debts; denies that any property was ever reconveyed to B. F. BAUM by WALTER GRANGER KLEINSCHMIDT; denies that said WALTER G. KLEINSCHMIDT, knew of the, or any failure on the part of defendant to disclose the knowledge of such transfer to the Trustee in bankruptcy to this Court, and alleges that there was no duty on the part of said B. F. BAUM, or any one else to do so; denies that B. F. BAUM, or WALTER GRANGER KLEINSCHMIDT, or any other person knew of, nor now knows of and/or became a party to the, or any concealment of any facts from the Trustee in bankruptcy, and/or from this Court.

WHEREFORE, defendant prays that judgment be granted against said petitioners and that defendant go hence with her costs.

Kent Blanche

That he is one of the attorneys for defendant Margaret D. Kleinschmidt.

That affiant makes this verification on behalf of said defendant Margaret D. Kleinschmidt for the reason that she is absent from the County of Los Angeles.

Subscribed and sworn to before me this 8 day of September, 1936.

Notary Public in and for said County and State
My Commission Expires May 20, 1938

[Endorsed]: Received copy of Answer this 8th day of Sept. 1936 Rupert B. Turnbull atty for plttf. Filed Sep 8 - 1936 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO ANSWER

Comes now Margaret D. Kleinschmidt, individually and as administratrix of the estate of Walter Granger Kleinschmidt, deceased, and, first having obtained leave of court, files this her amendment to her answer to the bill in equity heretofore filed in this cause.

I

Paragraph I of said answer is hereby amended by adding thereto the following:

This defendant denies that Walter Granger Kleinschmidt departed this life and became deceased in the month of February, 1936, and in this behalf defendant alleges that said Walter Granger Kleinschmidt died on November 23, 1935.

II

Paragraph II of the answer to said bill in equity is hereby amended by adding thereto the following:

Defendant denies that this is an action to recover the value of certain property transferred in violation of Section 2957, Division 3, Part 4, Title 14, Chapter 2, Article 3, of the Civil Code of California, and in this behalf defendant alleges that said section of said Civil Code does not pertain to transfers of property but solely to mortgages of personal property or crops.

III

Answering the allegations contained in paragraph III of said bill in equity defendant denies that on the 20th day of April, 1936, she became the duly appointed, qualified and acting administratrix of the estate of Walter Granger Kleinschmidt, deceased, and in this behalf defendant avers that she became such administratrix on the 16th day of April, 1936.

Further answering the allegations in said paragraph III of said bill in equity defendant denies that she is the sole heir at law of said Walter Granger Kleinschmidt, deceased, and in this behalf avers that said Walter Granger Kleinschmidt died intestate and left him surviving this defendant, the widow of said Walter Granger Kleinschmidt, and a daughter, Dorothy Kleinschmidt Payne.

IV

Paragraph III of said answer to said bill is amended by striking out the figure "IV" in line 24 on page 2 of said answer and in lieu thereof inserting the figure "V."

Paragraph III of said answer is further amended as follows, to wit:

The words "or is" in line 31 on page 2 are hereby stricken therefrom. The word ", defraud" is hereby inserted after the word "defeat" and before the word "and" in line 7 on page 3 of said answer. The words "defendant, Benjamin F. Baum" are inserted after the word "that" and before the word "as" in line 10 on page 3 of said answer. The word "in" is inserted after the

comma and before the word "and" in line 16 on page 3 of said answer. The words ", if any, of defendant, Benjamin F. Baum," are inserted after the word "interest" and before the word "had" in line 17 on page 3 of said answer, and the comma after the word "Kleinschmidt" and before the word "by" in said line on said page is hereby stricken therefrom. The words ", Benjamin F. Baum" are inserted in line 23 on page 3 of said answer after the word "defendant" and before the semicolon in said line. The figures "1931" in line 2 on page 4 of said answer are stricken and the figures "1933" are inserted in lieu thereof. The words ", Benjamin F. Baum" are inserted after the word "defendant" and before the semicolon in line 10 on page 4 of said answer.

V

Paragraph V of said answer to said bill is amended by adding thereto the following:

The words "In answer to paragraph VI of said bill, this defendant" are inserted before the word "Denies" in line 6 on page 5 of said answer. Paragraph V of said answer is further amended by striking out the figure "V" in line 9 on page 5 of said answer and in lieu thereof inserting the figure "VI." The words ", Benjamin F. Baum," are inserted after the word "defendant" and before the word "to" in line 21 on page 5 of said answer. The words ", Benjamin F. Baum," are inserted after the word "defendant" and before the word "had" in line 28 on page 5 of said answer.

Pillsbury, Madison & Sutro
Attorneys for said Defendant.

STATE OF CALIFORNIA,)
) ss.
 County of Los Angeles.)

MARGARET D. KLEINSCHMIDT, being first duly sworn, deposes and says: That she is one of the defendants named in the above entitled action; that she has read the foregoing amendment to answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

Margaret D. Kleinschmidt

Subscribed and sworn to before me
this 8th day of February, 1937.

NOTARY PUBLIC
in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb 9 - 1937 R. S. Zimmerman,
Clerk By Francis E. Cross Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT, CONCLUSIONS OF LAW

BE IT REMEMBERED, that the above entitled matter having come on regularly for trial before the above entitled court on the 9th day of February, 1937, and the plaintiff, Ernest U. Schroeter, being represented by his counsel Rupert B. Turnbull, and the defendant B. F. Baum being personally present and represented by his counsel of record, Kent Blanche, and the defendant Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and Margaret D. Kleinschmidt individually being represented by her counsel of record, Kent Blanche; and Messrs. Pillsbury, Madison and Sutro, and Mr. Samuel Wright being added as counsel of record for the defendant Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and Margaret D. Kleinschmidt individually; and the parties proceeding to trial without a jury, and consenting to trial by the court without a jury, and evidence oral and documentary having been introduced on behalf of the plaintiff and the plaintiff having rested, and the plaintiff having consented in open court to the dismissal of the action as to the defendant Margaret D. Kleinschmidt in her individual capacity. but not as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased; and the defendants B. F. Baum, and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, having respectively made their motions to dismiss the bill in equity and to enter a judgment and decree in favor of the said defendants and each of them,

and said motions having been heard by the court and the court having denied said motions and each of them, and having made its order requiring the said defendants B. F. Baum, and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, to proceed with their defense of said action, and the said defendants having then produced evidence both oral and documentary, and the defendants and each of them having rested their respective cases, and the matter having been submitted to the court for its decision after the citing of authorities and the arguments with respect to the facts, and the court having announced in open court orally its decision in favor of the plaintiff, Ernest U. Schoeter as Trustee in Bankruptcy of the Estate of B. F. Baum, Bankrupt, and against the defendants B. F. Baum, and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, the court now makes its:

FINDINGS OF FACT

I.

The court finds that the plaintiff, Ernest U. Schroeter, was at the time of the filing of this bill in equity, and still is, the duly elected, qualified and acting trustee in bankruptcy of and for the estate of B. F. Baum, Bankrupt. That the plaintiff is and was a resident and is and was a citizen of the State of California, residing in the City of Los Angeles, County of Los Angeles, and in the Southern District of California. That the defendant B. F. Baum, whose full name is Benjamin F. Baum, was duly adjudicated a bankrupt on the 6th day of November, 1931, and on the 6th day of November, 1931 this court duly and regularly made, gave and entered its order adjudicating Benjamin F. Baum a bankrupt within the meaning and

purview of the National Bankruptcy Act of 1898 and the amendments thereto. That at the time of the making of such adjudication Benjamin F. Baum, the bankrupt, filed his schedules in bankruptcy wherein under oath he purported to set forth in Schedule B a list of all of his assets, real and personal, but which did not disclose the mining property hereinafter described. That at the time of the making of said schedules and the filing thereof on the 6th day of November, 1931, at the time of the making of the decree of adjudication in bankruptcy as to said Benjamin F. Baum, said Benjamin F. Baum was the owner of an interest in a certain group of mining claims with water rights appertaining thereto, commonly known as the Camp Rock Mining property and also as Camp Rock Mines, situate in the Belleville Mining District in the County of San Bernardino, State of California. That the said property was and is more particularly known and described in the plaintiff's bill in equity as follows:

Royal Placer Claim No. 1, as per description recorded in Book 171, page 64, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 2, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 3, as per description recorded in Book 171, page 65, Mining Records County of San Bernardino, California.

Royal Placer Claim No. 4, as per description recorded in Book 179, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 5, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 6, as per description recorded in Book 171, page 67, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 7, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 8, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 9, as per description recorded in Book 171, page 69, Mining Records, County of San Bernardino, California.

Gold Junction Quartz Claim, as per description recorded in Book 168, page 189, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 1, as per description recorded in Book 168, page 183, Mining Records County of San Bernardino, California.

Gold Bar Claim No. 2, as per description recorded in Book 168, page 183, Mining Records County of San Bernardino, California.

all of said property being situate in the County of San Bernardino, in the Belleville Mining District, State of California.

That all the mining property referred to is situate in San Bernardino County, and that the bankruptcy of Benjamin F. Baum was filed at the place of his residence, at Los Angeles, California, and the administration of the estate of Benjamin F. Baum was administered through this court at Los Angeles, California, being referred to a Referee appointed, sitting and acting for and in the County of Los Angeles, California.

II.

The court finds that at the time of the adjudication of Benjamin F. Baum as a bankrupt on the 6th day of November, 1931, Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12th day of September, 1931, and less than sixty days prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining Property.

That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum's, contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum's, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at a date in the future and at a time when said Benjamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's creditors. That on September 12, 1931, Benjamin F. Baum made and

delivered to Walter Granger Kleinschmidt an instrument purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described.

The court finds that thereafter proceedings for the administration of Benjamin F. Baum as a bankrupt were had, that Benjamin F. Baum did not disclose to the trustee in bankruptcy in his estate, to-wit, Ernest U. Schroeter, nor to the Referee in Bankruptcy before whom the bankruptcy proceeding was pending, nor to the creditors of Benjamin F. Baum, that Benjamin F. Baum had an interest or had had any interest in and to the said Camp Rock mining property hereinbefore described, or any contractual or other interest therein or thereto.

That the total assets of the estate of Benjamin F. Baum as administered was less than the sum of \$800.00, and there was paid to the creditors of Benjamin F. Baum, through the medium of his bankruptcy, a dividend of less than one per cent on the dollar of such obligations of Benjamin F. Baum. That Benjamin F. Baum petitioned the court for his discharge, and on the 4th day of April, 1932, the court duly made, gave and entered its order discharging Benjamin F. Baum from his debts, as a bankrupt. The court finds that in the month of February, 1932 and during the time of the administration of the estate of Benjamin F. Baum as a bankrupt, Benjamin F. Baum made, executed and delivered to Walter Granger Kleinschmidt a quitclaim deed attempting to convey and purporting to convey the interest of the bankrupt, Benjamin F. Baum, in and to the Camp Rock Mining property hereinbefore described, to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt accepted said deed and the same was recorded with the County

Recorder of San Bernardino County. That none of said facts was known at said time to the trustee in bankruptcy, nor to the court, nor to the creditors of Benjamin F. Baum. That no order of court was obtained permitting the conveyance of said property. That Benjamin F. Baum informed Walter Granger Kleinschmidt, during the pendency of his bankruptcy administration, that he was a bankrupt, and the said Walter Granger Kleinschmidt knew, during the period of Administration of the estate of Benjamin F. Baum, that Benjamin F. Baum had been adjudicated a bankrupt and that his status was that of a bankrupt.

III.

The court finds that the estate of Benjamin F. Baum was closed and the administration thereof closed in the year 1932, without there being disclosed to the court or to the trustee of said estate, or to the creditors thereof, any information or knowledge concerning the interest of Benjamin F. Baum in and to the said Camp Rock Mining properties hereinbefore described, nor concerning the purported conveyances of the interest of the bankrupt B. F. Baum therein and thereto.

The court finds that in the month of November, 1931 and thereafter, Benjamin F. Baum continued to endeavor to sell the mining properties known as the Camp Rock Mining property hereinbefore described, acting on behalf of himself and Walter Granger Kleinschmidt and at the special instance and request of Walter Granger Kleinschmidt, and four days after the granting of the discharge in bankruptcy to Benjamin F. Baum, Benjamin F. Baum did, to-wit, on the 8th day of April, 1932, succeed in ob-

taining a purchaser for said property who agreed in writing to pay for said Camp Rock Mining properties the total sum of Fifty Thousand Dollars (\$50,000.00); that said purchaser consisted of Frank Llewellyn and Charles Evans.

The court finds that thereafter, by an agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum on one part, and Frank Llewellyn on the other, One Thousand Dollars (\$1,000.00) which had been paid on account of but not in full of the Fifty Thousand Dollar purchase price, was credited to Frank Llewellyn, and Charles Evans as a purchaser was eliminated and a new agreement was entered into and executed between the parties in writing, to-wit, Walter Granger Kleinschmidt as vendor and Frank Llewellyn as purchaser, under the terms of which Walter Granger Kleinschmidt purported to sell, and Frank Llewellyn agreed to buy and pay for the said Camp Rock Mining properties at an agreed price of Forty-nine Thousand Dollars (\$49,000.00). That said instrument was dated the 10 day of May, 1932.

The court finds that all of the Forty-nine Thousand Dollars provided for under the terms of the last mentioned agreement has been paid to Walter Granger Kleinschmidt and the estate of Walter Granger Kleinschmidt, Deceased.

The court finds that on the 15th day of November, 1932, Walter Granger Kleinschmidt made, executed and delivered to B. F. Baum an assignment in writing wherein and whereby said Walter Granger Kleinschmidt agreed to pay Benjamin F. Baum fifty per cent of the amount of moneys received by him from the sale or lease of the Camp Rock Mining properties. The court finds that

Walter Granger Kleinschmidt received a total of Forty-nine Thousand Dollars from the sale of said Camp Rock Mining properties. The court finds that the said conveyance and assignment was made by Walter Granger Kleinschmidt after Benjamin F. Baum had obtained his discharge in bankruptcy from this court in the matter of the bankruptcy proceedings of Benjamin F. Baum and after he had freed himself from the obligations to his, Benjamin F. Baum's creditors, and the said conveyance was made in compliance with, pursuant to and in accordance with the original agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum respecting the return to Benjamin F. Baum of his interests in the Camp Rock Mining property.

IV.

The court finds that it was contemplated between Benjamin F. Baum and Walter Granger Kleinschmidt that there should be paid out of the sales price of the Camp Rock Mining properties to one Frank Murray and his associates, twenty per cent of the profits of the Camp Rock mining deal. That the said Camp Rock mining deal consisted of the acquiring of the Camp Rock Mining properties from Henry C. Stock and Charles Pohl at a purchase price of Twenty-one Thousand, Eight Hundred Dollars (\$21,800.00), the sale thereof for Forty-nine Thousand Dollars (\$49,000.00), leaving a profit of Twenty-seven Thousand, Two Hundred Dollars (\$27,200.00), and that there should be paid to said Murray twenty per cent of Twenty-seven Thousand, Two Hundred Dollars, or Five Thousand, Four Hundred and Forty Dollars (\$5,440.00); that there should be given a credit, therefore, to the defendants in this proceeding for the Five Thousand, Four Hundred Forty Dollars (\$5,440.00)

to be paid to Murray, leaving Twenty-one Thousand, Seven Hundred Sixty Dollars (\$21,760.00); that Twenty-One Thousand Seven Hundred and Sixty Dollars (\$21,760.00) is the amount received by Walter Granger Kleinschmidt from the sale of the Camp Rock property; that one-half thereof is the sum of Ten Thousand, Eight Hundred and Eighty Dollars (\$10,880.00).

And that therefore, notwithstanding the recital in the assignment of November 15, 1932, that Kleinschmidt was to pay one-half of the money received by him, to-wit, the assignment from Walter Granger Kleinschmidt to Benjamin F. Baum, the court finds that there should be credited to the defendants the said twenty per cent of the profits to be paid to Murray, and that there should also be deducted the amount of money which Walter Granger Kleinschmidt paid to the persons from whom he purchased the mining property, to-wit, Henry C. Stock and Charles Pohl, to-wit, the sum of Twenty-one Thousand Eight Hundred Dollars (\$21,800.00), and the court finds that there was paid to Walter Granger Kleinschmidt the amount remaining, Twenty-one Thousand, Seven Hundred Dollars (\$21,700.00), and that fifty per cent thereof is the sum of Ten Thousand, Eight Hundred Eighty Dollars (\$10,880.00).

The schedule of payments, therefore, is as follows:

To Frank Murray—twenty per cent of the profit,	\$27,200.00	\$5,440.00
To Walter Granger Kleinschmidt—the amount remaining after the deduction of the payment to the original vendors Henry C. Stock and Charles Pohl and the payment to Murray		\$21,760.00

That the amount agreed to be paid, therefore, by Walter Granger Kleinschmidt to B. F. Baum is one-half of Twenty-one Thousand, Seven Hundred Sixty Dollars (\$21,760.00), or the sum of.....\$10,880.00

The court finds that none of said sum has been paid by Walter Granger Kleinschmidt, nor by the Estate of Walter Granger Kleinschmidt, nor by Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, to the plaintiff, nor to the estate of Benjamin F. Baum, a bankrupt, and all thereof is due, owing and unpaid, and that there exist no credits, nor offsets, to which the defendants or any of them are or ought to be entitled.

V.

The court finds that Walter Granger Kleinschmidt departed this life and became deceased on the 23rd day of November, 1935. The court finds that thereafter, in proceedings duly and regularly had, Letters of Administration were issued to the defendant Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and that said Letters were issued by the Superior Court of the State of California in and for the County of Santa Clara. That Margaret D. Kleinschmidt qualified in the manner required by law and in the manner required by the order appointing her as such administratrix, and on the 20th day of April, 1936 became, was and has been at all times since, the duly appointed, qualified and acting administratrix of the estate of Walter Granger Kleinschmidt, Deceased.

VI.

The court finds that on the 21st day of April, 1936, within the time allowed by law, the plaintiff executed his

creditor's claim which he served upon Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased. That said claim was in the form as attached to the plaintiff's bill in equity marked "Exhibit A." That said claim was made and executed in the manner provided by the laws of the State of California requiring the making of a written creditor's claim, the presentation thereof and the filing thereof, as a condition precedent to the commencement of an action against the estate of a deceased person. The court finds that the said creditor's claim was and is in the manner provided for by the law of the State of California, that the same was presented within the time allowed by the law of the State of California, that the same was filed within the time allowed by law of the State of California, and that Margaret D. Kleinschmidt as Administratrix filed her rejection of said claim. That this action was filed within the statutory time provided by the laws of the State of California with respect to the commencement of actions against the estate of a deceased person or the administrator or administratrix thereof, on a rejected claim.

VII.

The court finds that for more than sixty days continuously prior to the 6th of November, 1931, Benjamin F. Baum was insolvent. That court finds that the trustee in bankruptcy of the estate of Benjamin F. Baum and the creditors thereof did not discover, nor did it come to their attention, that Benjamin F. Baum had ever had any interest in the Camp Rock Mining Property hereinbefore described, until on or about the 3rd day of January, 1936. Thereupon, in proceedings duly had by a creditor to reopen the estate of Benjamin F. Baum and for a rerefer-

ence thereof for further administration, this court duly made its order on the 3rd day of January, 1936, which order was and is in words, letters and figures as follows, to-wit, a copy:

“IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 17686-M

In the Matter of	)	ORDER RE-OPENING
	)	BANKRUPTCY PRO-
BENJAMIN F. BAUM,	)	CEEDINGS AND
	)	RE-REFERENCE
Bankrupt)	

“A petitioner herein having filed his petition praying for the re-opening of this estate and its re-reference, on the ground that there is property which was not disclosed to the Bankruptcy Court nor to the Trustee thereof nor to the creditors and alleging that the same should be recovered and administered upon and good cause therefor appearing, it is hereby

“ORDERED, that the estate of the above named bankrupt be, and the same hereby is, re-opened for further proceedings herein and, it is further

“ORDERED, that this matter be, and it hereby is, re-referred to Referee in Bankruptcy, James L. Irwin, with instructions to elect a Trustee, examine the bankrupt, and take such other appropriate proceedings as are necessary for the administration of the property of the estate.

Los Angeles, California, January 3, 1936.

Paul J. McCormick
Judge”

That thereafter an order was duly made, given and rendered re-electing and reappointing Ernest U. Schroeter as trustee in bankruptcy of the estate of B. F. Baum on reopening, and said Ernest U. Schroeter, the plaintiff, prior to the commencement of this action and prior to the filing of his creditor's claim in the matter of Walter Granger Kleinschmidt, Deceased, qualified in the manner provided by law and in the manner provided for in the order so appointing him and electing him on reopening as trustee, and said plaintiff has been at all times, therefore, the duly elected, qualified and acting trustee in bankruptcy of the estate of Benjamin F. Baum, Bankrupt.

VIII.

The court finds that there is not funds in the estate of Benjamin F. Baum, bankrupt, nor in the possession or under the control of the plaintiff to pay the debts of Benjamin F. Baum, nor to pay the creditors' claims which have been filed in the estate of Benjamin F. Baum and which have been allowed by the court. The court finds that among others of said creditors existing during all of the month of September, 1931 and thereafter continuously and now as a creditor of Benjamin F. Baum, was and is Bank of America, having a claim filed and allowed in the estate of Benjamin F. Baum in a sum in excess of Nine Thousand Dollars (\$9,000.00). The court finds among the other creditors, having unsecured claims on file in the estate of Benjamin F. Baum and allowed by the court and remaining unpaid are the following:

Hartford Accident & Indemnity C.	\$3,200.00
J. D. Minister	1,200.00
Bank of America	9,000.00
Cudahy Packing Company	6,500.00

and many others. That said claimants and each of them are unsecured creditors of Benjamin F. Baum, whose claims have been filed and allowed by the court and remain unpaid.

IX.

The court finds that while the original contract of purchase of Camp Rock mining properties was made by and on behalf of Walter Granger Kleinschmidt, B. F. Baum and J. W. Sullivan, that prior to the sale of the property by Kleinschmidt to Frank Llewellyn, the interest of J. W. Sullivan had been eliminated.

And from the foregoing facts the court makes it

CONCLUSIONS OF LAW

The court concludes that the conveyances made by Benjamin F. Baum, both the one in September, 1931 and immediately prior to his bankruptcy, and the one in February 1932 after his bankruptcy, attempting to convey his interest in and to the Camp Rock Mining properties to Walter Granger Kleinschmidt, were made pursuant to and in accordance with an agreement between Walter Granger Kleinschmidt and Benjamin F. Baum to remove said property from the knowledge of the creditors of Benjamin F. Baum, from the knowledge of this court in the bankruptcy proceedings of Benjamin F. Baum, from the trustee in bankruptcy, the plaintiff, and this court. That the agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum was that the interest of the bankrupt Baum should be held by Walter Granger Kleinschmidt until such time as the bankrupt Baum should have cleared himself of his debts and thereupon, upon

demand, an interest or the avails of the sale thereof would be conveyed to Benjamin F. Baum.

The court finds that said agreement was carried out, that the property was concealed and the interest of the bankrupt was concealed from the court, from the creditors of Benjamin F. Baum and the plaintiff, and that the interest of Benjamin F. Baum was reconveyed to him in the form of a promise in writing dated November 15, 1932, by which Walter Granger Kleinschmidt agreed to pay to the bankrupt Baum fifty per cent of the amount received by Walter Granger Kleinschmidt from the sale or lease of the Camp Rock Mining property.

The court concludes that the conveyance of September 12, 1931 by Benjamin F. Baum to Walter Granger Kleinschmidt was made in contemplation of bankruptcy, was made without consideration, and was a fraud upon creditors of Benjamin F. Baum. The court concludes that the conveyance made on the 29th day of February, 1932, attempting to convey by deed, Benjamin F. Baum grantor, to Walter Granger Kleinschmidt, grantee, the Camp Rock mining property, was without consideration, was a void act, and the said conveyance did not pass any title to Walter Granger Kleinschmidt, same having been made and executed after the adjudication of Benjamin F. Baum, a bankrupt, having been made without the knowledge, without the consent of the court, the Referee in Bankruptcy or the Trustee in Bankruptcy, and without an order of the court or the Referee.

The court finds that Walter Granger Kleinschmidt received a total of Forty-nine Thousand Dollars (\$49,000.00) from the sale of the Camp Rock Mining properties hereinbefore described, and that he paid to Henry C. Stock and Charles Pohl, the original vendors of the property, the sum of Twenty-one Thousand, Eight Hundred Dollars (\$21,800.00), leaving a balance in the hands of Walter Granger Kleinschmidt of Twenty-seven Thousand, Two Hundred Dollars (\$27,200.00); that Walter Granger Kleinschmidt was obligated to pay to Frank Murray and his associates twenty per cent of the profit of \$27,200.00, or \$5,440.00, leaving a balance of \$21,760.00. The court finds that the net amount received by Walter Granger Kleinschmidt from the sale of the Camp Rock Mining properties heretofore described is the sum of \$21,760.00.

The court concludes and finds that the interest of Benjamin F. Baum in and to the Camp Rock Mining property herein described was of the value of Ten Thousand, Eight Hundred and Eighty Dollars (\$10,880.00); that Walter Granger Kleinschmidt has collected the sum of Ten Thousand, Eight Hundred and Eighty Dollars (\$10,880.00) and has not paid any part thereof to the plaintiff as trustee in bankruptcy of the estate of Benjamin F. Baum, nor to the estate of Benjamin F. Baum, a bankrupt, and that the estate of Walter Granger Kleinschmidt and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, are indebted to the plaintiff in the sum of Ten Thousand,

Eight Hundred and Eighty Dollars (\$10,880.00); that no offsets exist in favor of the defendants or either of them. That the plaintiff, Ernest U. Schroeter, as trustee in bankruptcy of the estate of B. F. Baum, is entitled to his costs as may be taxed in this action.

That in order to do complete justice between the parties, the court concludes that to clear any possible error or deficiency in the title of the Camp Rock Mines property which has been sold, deeded and conveyed by Walter Granger Kleinschmidt, that the plaintiff Ernest U. Schroeter, as trustee in bankruptcy, should and ought to be required to convey to the purchaser of the Camp Rock property, Frank Llewellyn, all the right, title and interest of the estate of the bankrupt B. F. Baum, and that the decree to be made in this matter so direct.

Let the decree follow in accordance with these findings and conclusions.

Dated at Los Angeles, California, February 23d, 1937.

Geo. Cosgrave

United States District Judge

[Endorsed]: Received copy of the within Findings and Conclusions this 15 day of February, 1937. Kent Blanche, Attorney for deft B. F. Baum. Served in mail also upon Pillsbury, Madison & Sutro. In mail February 15th 1937. See Affidavit of service by R. B. Turnbull. Filed Feb. 23, 1937 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL
DIVISION

ERNEST U. SCHROETER as)	
Trustee in Bankruptcy of the)	
Estate of B. F. Baum, Bankrupt)	
)	
Plaintiff)	
vs)	In Equity
)	No. 959-C
B. F. BAUM, MARGARET D.)	
KLEINSCHMIDT as Admin-)	JUDGMENT
istratrix of the Estate of Walter)	AND DECREE
Granger Kleinschmidt, Deceased;)	
M A R G A R E T D. KLEIN-)	
SCHMIDT individually,)	
)	
Defendants)	

BE IT REMEMBERED, that the above entitled mat-
ter having come on regularly for trial before the above
entitled court on the 9th day of February, 1937, and the
plaintiff, Ernest U. Schroeter, being represented by his
counsel Rupert B. Turnbull, and the defendant B. F.
Baum being personally present and represented by his
counsel of record, Kent Blanche, and the defendant Mar-
garet D. Kleinschmidt as Administratrix of the Estate of
Walter Granger Kleinschmidt, Deceased, and Margaret
D. Kleinschmidt individually being represented by her
counsel of record, Kent Blanche; and Messrs. Pillsbury,
Madison and Sutro, and Mr. Samuel Wright being added
as counsel of record for the defendant Margaret D.

Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and Margaret D. Kleinschmidt individually; and the parties proceeding to trial without a jury, and consenting to trial by the court without a jury, and evidence oral and documentary having been introduced on behalf of the plaintiff and the plaintiff having rested, and the plaintiff having consented in open court to the dismissal of the action as to the defendant Margaret D. Kleinschmidt in her individual capacity, but not as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased; and the defendants B. F. Baum, and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, having respectively made their motions to dismiss the bill in equity and to enter a judgment and decree in favor of the said defendants and each of them, and said motions having been heard by the court and the court having denied said motions and each of them, and having made its order requiring the said defendants B. F. Baum, and Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, to proceed with their defense of said action, and the said defendants having then produced evidence both oral and documentary, and the defendants and each of them having rested their respective cases, and the matter having been submitted to the court for its decision after the citing of authorities and the arguments with respect to the facts, and the court having made and filed its written findings of fact and written conclusions of law, now, therefore,

IT IS HEREBY ORDERED AND DECREED:

I.

That the plaintiff, Ernest U. Schroeter, as Trustee in Bankruptcy of the Estate of B. F. Baum, Bankrupt, have and recover judgment of and from the defendant Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and against the defendant B. F. Baum, in the sum of Ten Thousand, Eight Hundred and Eighty Dollars (\$10,880.00), together with interest thereon at the rate of seven per cent per annum from the date of the entry of this judgment.

II.

That the plaintiff, Ernest U. Schroeter, as Trustee in Bankruptcy of the Estate of Benjamin F. Baum, Bankrupt, have and recover judgment in his favor and against the defendants Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, Deceased, and B. F. Baum, for the plaintiff's costs as herein taxed in the sum of \$58.50.

III.

IT IS FURTHER ORDERED AND AGREED that in order to do complete justice between the parties, Ernest U. Schroeter as Trustee in Bankruptcy of the Estate of B. F. Baum, Bankrupt, be and hereby is ordered and instructed to make and execute, as Trustee in Bankruptcy of the Estate of B. F. Baum, Bankrupt, a quitclaim deed conveying any and all right, title and interest of the estate of Benjamin F. Baum, Bankrupt, and any and all right, title and interest of Ernest U. Schroeter as Trustee in Bankruptcy of the Estate of B. F. Baum, Bankrupt, in and to the Camp Rock Mining properties situate in the

Belleville Mining District, County of San Bernardino, State of California, more particularly described as:

Royal Placer Claim No. 1, as per description recorded in Book 171, page 64, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 2, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 3, as per description recorded in Book 171, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 4, as per description recorded in Book 179, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 5, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 6, as per description recorded in Book 171, page 67, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 7, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 8, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 9, as per description recorded in Book 171, page 69, Mining Records, County of San Bernardino, California.

Gold Junction Quartz Claim, as per description recorded in Book 168, page 189, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 1, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 2, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California.

all of said property being situate in the County of San Bernardino, in the Belleville Mining District, State of California;

to Frank Llewellyn; and

IT IS FURTHER ORDERED that said Ernest U. Schroeter cause said quicclaim deed to be recorded in the office of the County Recorder of San Bernardino County, California, within sixty days from the date of the entry of this decree.

Dated at Los Angeles, California, this 23d day of February, 1937.

Geo Cosgrave

United States District Judge

Decree entered and recorded 2/23/37

R. S. Zimmerman Clerk,

By Francis E. Cross Deputy Clerk.

[Endorsed]: Received copy of the within Judgment and Decree this 15th day of February 1937 Kent Blanche Attorney for Deft B F Baum. Served by mail also upon Pillsbury, Madison & Sutro Attorneys for defendants by mail February 15th 1937. See affidavit of service by R. B. Turnbull. Filed Feb 23 1937 R. S. Zimmerman Clerk By Francis E Cross Deputy Clerk.

STATEMENT OF EVIDENCE ON APPEAL AS
REQUIRED BY EQUITY RULE NO. 75

In the District Court at Los Angeles, California, before the Honorable George Cosgrave, judge presiding, the trial came on February 9, 1937 and was concluded on February 10, 1937.

(Testimony of Mary Holmes)

The following is the testimony of the witnesses in narrative form:

MARY HOLMES,

witness called by the plaintiff, testified substantially as follows: I am employed as a clerk in the office of Referee Benno Brink, a referee in bankruptcy before this district, and I have produced a file of Benjamin F. Baum, a bankrupt.

(There was offered and received in evidence plaintiff's Exhibit 1 which consisted of the order of the District Court adjudicating Benjamin F. Baum a bankrupt, on November 6, 1931.)

(There was offered and received in evidence plaintiff's Exhibit 2 which consisted of the schedules of the bankrupt as filed at the time of his adjudication in November, 1931. The schedules showed that there were creditors of the bankrupt having provable claims at the date of the bankruptcy aggregating in excess of \$90,000.)

(There was offered and received in evidence plaintiff's Exhibit 3 which consisted of the order of the referee in the Matter of Baum which showed the election and qualification of Ernest U. Schroeter as a trustee in bankruptcy, together with the order of the court approving the trustee's bonds.)

(There was offered and received in evidence plaintiff's Exhibit 4 which consisted of the order closing the estate and showed a dividend paid of less than 1 per cent to creditors.)

(Testimony of R. C. Groner)

(There was offered and received in evidence plaintiff's Exhibit 5 which consisted of the discharge of the bankrupt as granted by the District Court.)

(There was offered and received in evidence plaintiff's Exhibit 6 which consisted of the petition on reopening of the estate and the order of the District Court reopening the case for further administration.)

(There was offered and received in evidence plaintiff's Exhibit 7 which consisted of the order of the referee on the reopening and showed the election and qualification of Ernest Schroeter as trustee on reopening of the estate.)

(There was offered and received in evidence plaintiff's Exhibit 8 which consisted of the order of the referee approving trustee's bonds on his requalification on reopening.)

R. C. GRONER,

witness called by the plaintiff, testified substantially as follows: My full name is R. C. Groner and I am Assistant Cashier of the Bank of America National Trust and Savings Association.

(There was offered and received in evidence plaintiff's Exhibit 9 which consisted of the claim of the Bank of America filed in the bankruptcy proceeding of Benjamin F. Baum for \$9,383.75, which claim was filed December 12, 1931, and was allowed June 23, 1933.)

(Testimony of R. C. Groner)

MR. GRONER:

The Bank of America has an account in the name of Benjamin F. Baum. The claim of the Bank of America against Mr. Baum is founded upon an obligation of Mr. Baum to the Bank created coincidentally with a loan of money by the Bank to Mr. Baum. At the time the claim was filed, the obligation owed by Mr. Baum to the Bank of America had not been paid. Since the filing of the claim the obligation has not been paid and a balance in the amount of \$9,079.33 remains unpaid.

CROSS-EXAMINATION

The unpaid balance of this bill at the present time amounts to \$9,079.33 and is evidenced by the promissory note of H. W. Baum Company. Mr. Benjamin F. Baum signed the note for the company in the following manner: H. W. Baum Company, by B. F. Baum (p. 9). The H. W. Baum Company was a partnership composed of B. F. Baum and H. W. Baum whom I believe to be brothers. I do not know how much property Benjamin F. Baum had at the time he went bankrupt (p. 11).

(There was offered and received in evidence, as plaintiff's Exhibit 10, the original of a certain assignment agreement dated the 22nd day of August, 1931, reported on the same day on the files of the County Recorder of San Bernardino County bearing the certificate of the County Recorder over his official seal.)

There was offered in evidence a certified copy of an agreement certified to by the Recorder of San Bernardino County and bearing the certificate of recordation of

the County Recorder of San Bernardino County over his official seal and signature. Mr. Wright counsel for the defendant, objected to the introduction of the document in evidence on the ground that the same was not the best evidence, and then and there produced from the defendant's files the original of said certified copy and stated that the same was the original.

Thereupon attorney for the plaintiff accepted the original and offered the same in evidence, together with the certificate of recordation of the County Recorder of San Bernardino County showing that said document was recorded August 28, 1931, at 10:45 A. M. in Book 737, page 385, Official Records of San Bernardino County, California.

Counsel for the defendant then objected to the introduction of the document in evidence on the ground that it had not been proven that it had been delivered at any time. The objection was overruled and exception was taken and allowed.

(The exhibit referred to reads in the following words and figures, to wit:)

"ASSIGNMENT

IN CONSIDERATION that BENJAMIN F. BAUM has agreed and does hereby agree to supply one-third ($1/3$) of the necessary funds to comply with that certain agreement for the sale of mining property executed on the 16th day of April, 1931 by Charles Pohl and Henry C. Stock, as Vendors, and J. W. Sullivan, as Purchaser, said agreement being recorded in Book 710 Page 387 of the Official Records of the County Recorder of the County of San Bernardino, State of California; said agreement being for the sale and purchase of the following described

property situated in the Belleville Mining District, County of San Bernardino, State of California, to-wit:

‘Royal Placer Claim No. 1,’ ‘Royal Placer Claim No. 2,’
 ‘Royal Placer Claim No. 3,’ ‘Royal Placer Claim No. 4,’
 ‘Royal Placer Claim No. 5,’ ‘Royal Placer Claim No. 6,’
 ‘Royal Placer Claim No. 7,’ ‘Royal Placer Claim No. 8’
 and ‘Royal Placer Claim No. 9,’ all as situated in Section 28, Township 7 North, Range 3 East, S. B. B. & M. in said County and State;

Also including the following placer claims in said district of said County and State:

‘Gold Junction,’
 ‘Gold Bar No. 1’
 ‘Gold Bar No. 2’

Also including that certain placer and water rights claim, containing about 160 acres and known as the ‘Sullivan Placer Claim’ situated in said Belleville Mining District, said County and State, Section 30, Township 7 North, Range 3 east, S. B. B. & M’

and for other good and valuable consideration, I, J. W. SULLIVAN, do hereby assign, transfer and set over unto BENJAMIN F. BAUM, thirty three and one-third (33-1/3) per cent of all of the right, title and interest of the purchaser, as set forth herein.

(Notarial Seal) (Signed) J. W. SULLIVAN

Subscribed and sworn to before me this 22nd day of August, 1931.

E. M. Sullivan

Notary Public in and for the County of Los Angeles,
 State of California.

STATE OF CALIFORNIA,)
 County of Los Angeles) ss.

On this 22nd day of August A. D. 1931, before me Victor Russell Hansen, a Notary Public in and for said County and State, personally appeared J. W. Sullivan, known to me, (or proved to me on the oath of Kent Blanche), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal)

(Signed) Victor Russell Hansen
 Notary Public in and for said County and State.

Recorded Aug 28 1931 10:45 A. M. In Book 737
 Page 385 Official Records San Bernardino County, Calif.

Fulton G. Ferand,
 County Recorder
 By A. R. Schultz, Deputy.

I certify that I have correctly transcribed this document in above mentioned book.

M. Smith, Copyist
 M. Kavanaugh."

(There was offered and received in evidence, as plaintiff's Exhibit 11, a document dated the 29th day of February, 1932, showing a recordation of the instrument of July 30, 1932, in the office of the County Recorder of San Bernardino County.)

(The exhibit referred to reads in the following words and figures, to wit:)

“THIS INDENTURE, Made the 29th day of February in the year of our Lord, one thousand nine hundred thirty two between BENJAMIN F. BAUM, party of the first part, and WALTER G. KLEINSCHMIDT, party of the second part,

WITNESSETH, that for and in consideration of the sum of TEN and no/100 Dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part do__ by these presents remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land situate in the Belleville Mining District, County of San Bernardino, State of California, and bounded and particularly described as in location notices filed with the County Recorder of the County of San Bernardino, State of California, as follows:

Royal Placer Claim Number 1, as per description recorded in Book 171, Page 64, Mining Records.

Royal Placer Claim Number 2, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 3, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 4, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 5, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 6, as per description recorded in Book 171, Page 67, Mining Records.

Royal Placer Claim Number 7, as per description recorded in Book 171, page 68, Mining Records.

Royal Placer Claim Number 8, as per description recorded in Book 171, Page 68, Mining Records.

Royal Placer Claim Number 9, as per description recorded in Book 171, Page 69, Mining Records.

Gold Junction Quartz, as per description recorded in Book 168, Page 189, Mining Records.

Gold Bar No. 1, as per description recorded in Book 168, Page 183, Mining Records.

Gold Bar No. 2, as per description recorded in Book 168, Page 183, Mining Records.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and To Hold all and singular the said premises together with the appurtenances unto the said party of the second part and to his heirs and assigns forever.

In Witness Whereof the said party of the first part has hereunto set his hand the day and year first above written.

(Signed) Benjamin F. Baum

STATE OF CALIFORNIA,)
 County of Los Angeles) ss.

On this 7th day of April, in the year one thousand nine hundred thirty-two before me, Freda R. Paulson, a Notary Public in and for said County and State, personally appeared BENJAMIN F. BAUM, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged that he executed the same.

WITNESS my hand and official seal the day and year in this certificate first above written.

(Notarial Seal) (Signed) Freda R. Paulson,
 Notary Public in and for said County and State

QUITCLAIM DEED INDIVIDUAL BENJAMIN F. BAUM to WALTER G. KLEINSCHMIDT Dated February, 1932. In Book 830, Page 251, Official Records, San Bernardino County, Fulton G. Feraud, County Recorder, By Frank McNerny Deputy.

I certify that I have correctly transcribed this document in above mentioned book. K. Keller, Copyist.

When recorded, please mail this instrument to Security Title Inc. & Gua Co. 530 W 6th St. Los Angeles, California."

(There was offered and received in evidence, as plaintiff's Exhibit 12, instrument dated San Francisco, California, November 15, 1932, made by W. G. Kleinschmidt, and assigning to B. F. Baum 50 per cent of all and any amounts of money received by W. G. Kleinschmidt from the sale or lease of the Camp Rock Placer Mine) (p. 24).

(The exhibit referred to reads in the following words and figures, to wit:) (pp. 25-27)

“San Francisco, California
November 15, 1932

In consideration of one dollar (\$1.00) and other good and valuable consideration, I, the undersigned, W. G. Kleinschmidt, hereby grant and assign to B. F. Baum fifty per cent (50%) of any and all amounts of money received by me from the sale or lease of the Camp Rock Placer Mine situated in San Bernardino County, California, after having deducted, when payable, from such amounts of money certain sums due Frank J. Murray, J. W. Sullivan and certain other parties mentioned in that certain agreement between W. G. Kleinschmidt, B. F. Baum and J. W. Sullivan, dated the twenty-fourth (24th) day of April, 1931. The said Camp Rock Placer Mine is now held under sale contract by Frank Llewellyn and there is due, as of November 15, 1932, from said Frank Llewellyn, under said sale contract, thirty-nine thousand two hundred dollars (\$39,200.).

W. K. Kleinschmidt

STATE OF CALIFORNIA)
CITY AND COUNTY OF SAN FRANCISCO) SS

On this 15th day of November, 1932, before me, W. W. Healey, a Notary Public in and for the city and county and state aforesaid, residing therein, duly commissioned and sworn, personally appeared W. G. Kleinschmidt, known to me to be the person whose name is subscribed to and who executed the foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county and state aforesaid the day and year in this certificate first above written.

(NOTARIAL SEAL)

W. W. Healey

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 29, 1936.

Accepted: B. F. Baum

No. 39 'Endorsed' Recorded at Request of Kent Blanche Dec 15 1932 at 10:05 A. M. in Book 857, Page 285, Official Records, San Bernardino County, Calif., Fulton G. Feraud, County Recorder, By A. R. Schultz, Deputy, Fee \$1.00.

Compared

M. Kavanaugh

E. Quinn

— — —

EM

County of San Bernardino,)
State of California) ss.

I, Ted R. Carpenter, County Recorder in and for the County of San Bernardino, State of California, do hereby certify that the foregoing is a full, true and correct copy of the Assignment recorded in book 857 of Official Records page 285 of San Bernardino County Records.

In Witness Whereof, I have hereunto set my hand and affixed my official, this 3rd day of December, 1936.

Ted R. Carpenter, County Recorder
..... Deputy."

(Testimony of Carlton C. Sixbey)

CARLTON C. SIXBEY,

a witness called on behalf of plaintiff, testified substantially as follows: My full name is Carlton C. Sixbey.

(Counsel stipulated that the original agreement of the 18th of August, 1931, so-called Kleinschmidt-De'Elia contract, consisting of two pages, is in the handwriting of Mr. Kleinschmidt and that the signatures of Mr. Kleinschmidt where they occur in two places therein are his signatures [p. 28].)

(It was stipulated that the witness on the stand, Carlton C. Sixbey, could and would identify the signatures as those of W. G. Kleinschmidt, and it was further stipulated that the signatures on Exhibit 13 were the signatures of W. G. Kleinschmidt as they appeared in the two places in the instrument, which reads as follows:

PLAINTIFF'S EXHIBIT 13

“San Francisco, Calif.
August 20, 1931.

Mr. F. J. Murray,
Los Angeles, Calif.

Dear Mr. Murray:

In response to your request that I approve the assignment of interest in the Sullivan purchase agreement, I can not and will not approve such an assignment as this is not in accordance with the agreement which was made at the time we agreed to purchase the property. You can appreciate the difficulties we would encounter in trying to

dispose or operate the property if we had to get the consent of ten or more people for every move we desired to make. We invested our money only on the basis that we would have the right to do what we thought best, but to pay you 20% of any profits from the operation or sale of the property. I believe this is a liberal commission and if any of the parties to which you assigned a part of this commission has opinions to the contrary, I would suggest you refer them to me.

We are supplying all of the money to purchase the property and any expense involved is also paid by us. Under such circumstances we certainly would not permit others to have the right to tell us what we could or could not do. Mr. Sullivan has assigned a one third interest to me and to Mr. Baum, and in addition we have agreed that any two of the three of us can determine what is to be done. If there is anything further in connection with this matter that is not clear let me know.

Very truly yours,

(Signed) W. G. Kleinschmidt")

Mr. Wright objected to the admission on the ground that the letter was incompetent, irrelevant and immaterial; that it was not within the issues of the case and was contradictory to the theory expressed in the complaint, namely, that the interest in question was dated August 20, 1931 (p. 29). The objection was overruled. An exception was taken and allowed.

(There was offered and received in evidence plaintiff's Exhibit 14 consisting of the duplicate original of the claim as filed in the Estate of Walter Granger Kleinschmidt, the claim of the trustee in bankruptcy and rejection of that claim as communicated to the plaintiff by Margaret G. Kleinschmidt under date of June 24, 1936, and which reads as follows:

PLAINTIFF'S EXHIBIT 14

“Receipt of copy of this rejection of claim is hereby acknowledged this 25th day of June, 1936.

(Signed) Rupert B. Turnbull
Attorneys for Claimant

In the Superior Court of the State of California, in and
for the County of Santa Clara

_____)	
In the Matter of the Estate of)	
)	
WALTER G. KLEINSCHMIDT,	)	No. 20857
)	
also known as Walter Granger Kleinschmidt)	
and W. G. Kleinschmidt)	
)	
Deceased.)	
_____)	

REJECTION OF CLAIM

To Ernest U. Schroeter as Trustee in Bankruptcy of the Estate of Benjamin F. Baum, a Bankrupt, and Messrs. Pacht, Turnbull, Pelton & Warne, his attorneys:

You and each of you are hereby notified that your claim for the sum of \$25,000 heretofore filed with the County

Clerk of the County of Santa Clara, State of California,
on or about the 3rd day of June, 1936, is hereby rejected
by Margaret D. Kleinschmidt, the administratrix of the
estate of the above mentioned decedent, this 24th day of
June, 1936.

Margaret D. Kleinschmidt
Administratrix of the Estate of Walter G. Klein-
schmidt, Deceased

Pillsbury, Madison & Sutro
Attorneys for Administratrix

No. 20857 Dept.

Superior Court
County of Santa Clara
State of California

In the Matter of the Estate of
WALTER G. KLEINSCHMIDT.

also known as Walter Granger
Kleinschmidt and W. G.
Kleinschmidt,

Deceased.

REJECTION OF CLAIM

Pillsbury, Madison & Sutro
Attorneys at Law

Standard Oil Building San Francisco, Cal.

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF SANTA CLARA

In the Matter of the Estate of)
)
WALTER GRANGER) CREDITOR'S CLAIM
KLEINSCHMIDT)
Deceased.)

April 21, 1936.

The undersigned, a creditor of Walter Granger Kleinschmidt, deceased, herewith presents his claim against the estate of said deceased, with the necessary vouchers, to Margaret D. Kleinschmidt as Administratrix of said estate, for approval, as follows:

ESTATE OF Walter Granger Kleinschmidt, deceased.

TO Ernest U. Schroeter as Trustee in Bankruptcy of the Estate of Benjamin F. Baum, Bankrupt. Dr.

To one-half of the purchase price of those certain mining properties in the Bellville Mining District, San Bernardino County, California, known as the Camp Rock Mine, which property was owned by Walter Granger Kleinschmidt and Benjamin F. Baum jointly at all times since the acquisition of the property prior to the bankruptcy of Benjamin F. Baum in 1932; was owned by Walter Granger Kleinschmidt and Benjamin F. Baum jointly at all times since said date, and which property was sold by Walter Granger Kleinschmidt and Benjamin F. Baum for the sum of \$50,000.00.

This claim is based first on the ground that Walter Granger Kleinschmidt, at the request of the bankrupt, Benjamin F. Baum, took a conveyance of the interest of Benjamin F. Baum and retained the same at the time Benjamin F. Baum filed his voluntary petition in bankruptcy, during all of the period of administration of the Estate of Benjamin F. Baum, a bankrupt; and after the closing of the Estate of Benjamin F. Baum at the request of Benjamin F. Baum reconveyed to Benjamin F. Baum an undivided one-half interest in said property. That the said conveyance was made for the purpose of concealing the assets of Benjamin F. Baum, particularly his interest in the Camp Rock Mine, from the creditors of Benjamin F. Baum. That the creditors of Benjamin F. Baum and his bankrupt's estate and Ernest U. Schroeter as the Trustee in Bankruptcy upon reopening, as well as the original Trustee in Bankruptcy, have not collected any interest or share of Benjamin F. Baum in and to said property. This claim is also based on the ground that funds from the purchase price of said Camp Rock Mine now remain in the custody under the control or in the care of the Estate of Walter Granger Kleinschmidt and the Administratrix thereof. The amount of this claim is the sum of \$25,000.00, for which demand is made upon the estate of the deceased and the Administratrix thereof for payment. There is attached to and submitted with this claim a certified copy of the order appointing said claimant as Trustee in Bankruptcy; also a certificate of the filing of his bond upon qualification as such Trustee.

STATE OF CALIFORNIA, () ss. (INDIVIDUAL
County of Los Angeles (CLAIM)

whose foregoing claim is herewith presented to the
of the estate of said deceased, being duly sworn, says,
that the amount thereof, to-wit, the sum of
Dollars is justly due to said claimant, that no
payments have been made thereon which are not credited,
and that there are no offsets to the same to the knowledge
of the claimant or affiant

Subscribed and sworn to before me day of
..... 193.....

.....

.....
Notary Public in and for said County and State.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles.)

(OTHER THAN INDIVIDUAL CLAIM)

Ernest U. Schroeter, being first duly sworn, deposes and
says: That he is Trustee in Bankruptcy of Estate of
Benjamin F. Baum whose foregoing claim is herewith
presented to Margaret D. Kleinschmidt, Administratrix
of said claim, to-wit, the sum of Twnety-five Thousand
on behalf of said (3) Bankrupt Estate. That the amount
of said claim, to-wit, the sum of Twenty-five Thousand

Dollars (\$25,000.00) is justly due to the said claimant, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said affiant.

(Signed) Ernest U. Schroeter,
as Trustee of Estate of Benjamin F. Baum, Bankrupt.

Subscribed and sworn to before me this 23rd day of April, 1936.

Florence Robinson
Notary Public in and for said County and State.

(1) Co-partnership or corporation, as the case may be; insert names of individuals composing partnership; if a corporation, so state, giving name of State in which same was organized.

(2) State fully capacity in which affiant acts. If a member of the firm, say so; if a managing agent, state why it is not sworn to by one of the principals; if an officer of a corporation, state what officer.

(3) Co-partnership or corporation.

No. 20857

Superior Court

State of California

County of Los Angeles

In the Matter of the Estate of

WALTER GRANGER KLEINSCHMIDT, Deceased.

CLAIM OF Ernest U. Schroeter, Trustee

whose post-office address is
 711 H. W. Hellman Bldg., Los Angeles, California
 For \$25,000.00

PACHT, TURNBULL, PELTON & WARNE
 Attorneys for Trustee in Bankruptcy
 510 Union Bank Bldg.,
 Los Angeles, Calif.

Filed for approval and notice mailed:

..... 193....

L. E. LAMPTON, County Clerk,
 by

Deputy.

Within claim allowed and approved for \$..... this
 day of 193..... of the Estate.

Allowed and approved for \$..... this day of
 193.....

.....

Judge.

The within claim REJECTED this day of.....
 193....")

Mr. Wright stipulated that the copy was one sent on
 the paper of Pillsbury, Madison & Sutro.

(There was offered and received in evidence as plain-
 tiff's Exhibit 15 a letter of June 2, 1936, to the County
 Clerk of Santa Clara County, San Jose, California, and
 endorsement by him of the receipt of the claim.)

(There was offered and received in evidence plaintiff's
 Exhibit 16 consisting of the order approving and con-
 firming the first and final report in the account of the trustee showing a disbursement of the \$709 that comprised the assets of this estate [p. 38].)

(There was offered and received in evidence as plaintiff's Exhibit 17 the first and final dividend sheet signed by Earle R. Moss, the referee in bankruptcy in the Estate of Benjamin F. Baum, showing the existence of a number of creditors who participated, and which reads as follows:

PLAINTIFF'S EXHIBIT 17

“IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT
OF CALIFORNIA CENTRAL DIVISION

In Bankruptcy, No. 17686-M.

In the Matter of)	
	(	FIRST AND FINAL
BENJAMIN F. BAUM,	)	DIVIDEND
	(	June 23, 1933.
Bankrupt.)	

PAUL J. ZIEGLER,
700 Lane Mortgage Bldg.,
Los Angeles, Calif.,

E. V. Fallgren Co. Ltd.,	\$8,336.85
--------------------------	------------

E. H. HOWLETT,
P. O. Box 115,
Los Angeles, Calif.,

Cudahy Packing Co., Assignee of	
various claims	
as set forth in	
said claim,	
totaling,	6,558.45

BURTON A. VAN TASSEL,
548 S. Spring St.,
Los Angeles, Calif.,

Hartford Accident & Indemnity Co., 3,218.78

GLEN BEHYMER, and/or B. L. HOYT,
and/or BERTRAND RHINE,
1215 Rives-Strong Bldg.,
Los Angeles, Calif.,

Emil Brown & Co., 2,944.40

E. W. Robinson Truck Co., ,814.12

Musto-Keenan Co., 43.00

BERNARD HEIMENZ

1101 Garland Bldg
Los Angeles, Calif.,

J. D. Minster 1,279.88

C. E. SPENCER & CHAS. J. GRIFFIN

9441 Wilshire Blvd., See Sub. of
Beverly Hills, Calif., Rupert B. Turnbull

C. E. Spencer 80.00

DIRECT

Bank of America Nat'l Trust & Savings Ass'n

c/o Edmund Nelson & Benj I Bloch

910 Bank of America Bldg., \$9,323.15 Prin.

Los Angeles, Calif., 60.60 Int.

Elizabeth M. Sands

914 Georgina Ave.,

Santa Monica, Calif., 4,000.00 Plus
int. at
8%

Thomas Haverty Co.,

316 E. 8th St.,

Los Angeles, Calif., 3,946.05

Upon evidence submitted upon the above and foregoing claims, the said claims, and each of them, are hereby allowed for the amounts set forth, with the exceptions above noted. Said exceptions are suspended or disallowed for the amounts set forth, as therein stated.

Dated: June 23, 1933

(Signed) Earl E. Moss,
Referee.

CASH ON HAND FOR DISTRIBUTION \$588.24

REFEREE'S EXPENSE

Indemnity fee	\$39.53
7 certified copies	3.50
3 called meetings re sales	15.00
1 hearing on Petition	1.50
1 hearing on Order to Show Cause	1.50
2 continuances	3.00
Excess Notices	35.40
	<hr/>
	99.43

REFEREE'S FILING FEE

1 additional claim filed	.25
--------------------------	-----

NOTARY FEE

Eleanor C. Rose	\$4.00
Florence Robinson	2.00

REPORTER'S FEE

E. B. Bowman	\$—
--------------	-----

APPRAISERS

Crules R. Cheek 2 days \$5
 R. M. Crail 2 days \$5
 C. M. Henry 2 days \$5 C. M. Henry, expense \$2.00
 Chas J. Asche) Appraisers
 B. H. Dodt) Phoenix
 Joe V. Prochaska) Arizona
 5 each

Petition filed November
 30, 1932, asking for
 \$10.00 each, fees \$.....
 and expense for
 B. H. Dodt \$2.00

TO BE PAID

John H. A. Campbell, Earned portion of second
 year's premium on Trustees Bond \$.....

ALLOWANCES ASKED

Ernest U. Schroeter, Trustee's Fee	\$38.37	\$.....
Ernest U. Schroeter, Trustee's office	25.00	
expense	35.00	\$.....
Clarence Hansen, Attorney for		
Trustee	250.00 75	\$.....
Bicksler, Parke & Catlin, Attorneys		
for Bankrupt	50.00	\$.....
(Signed) Earl E. Moss,		
Referee		

Dated: June 23, 1933.")

(Counsel representing all parties stipulated that the property described in the schedules as the Camp Rock property was sold for the sum of \$50,000 [p. 40].)

(Counsel representing all parties stipulated that no part of the sum of \$50,000 had been paid to the trustee in bankruptcy of Benjamin F. Baum [p. 41].)

(Counsel representing all parties stipulated that the instrument of April 24, 1931, bore the signatures of Walter G. Kleinschmidt, Benjamin F. Baum and J. W. Sullivan, and thereupon plaintiff offered and there was introduced in evidence plaintiff's Exhibit 18, which reads as follows:

"AGREEMENT

THIS AGREEMENT made and entered into the 24th day of April, 1931, between WALTER G. KLEINSCHMIDT, BENJAMIN F. BAUM and J. W. SULLIVAN,

WITNESSETH, That,

WHEREAS, the said parties have acquired that certain mining property known as Camp Rock Placer Mine, located about twenty-one (21) miles northeast of the Box 'S' Ranch, San Bernardino County, California, being fully described in that certain agreement for sale of mining property recorded in Book 710 page 387 of Official Records in the office of the County Recorder of the County of San Bernardino, State of California; that,

WHEREAS, all parties hereto are desirous of fulfilling the terms of said agreement for sale of mining property and of operating said Camp Rock Placer Mine,

NOW, THEREFORE, in consideration of the premises, and of the mutual promises of the parties hereto,

IT IS HEREBY UNDERSTOOD AND AGREED that the said WALTER G. KLEINSCHMIDT, BENJAMIN F. BAUM and J. W. SULLIVAN, agree to supply in equal proportion the necessary funds to purchase and operate said property.

IT IS UNDERSTOOD AND AGREED that the profits derived from the operation or sale of the above said Camp Rock Placer Mine, or any part thereof, shall be divided and distributed as follows, to-wit:

W. G. Kleinschmidt	- 26-2/3
Benjamin F. Baum	- 26-2/3
J. W. Sullivan	- 26-2/3

and twenty (20) per cent. in eight (8) equal parts to each of the following persons, to-wit:

J. W. O'Neill
 B. J. Desmond
 F. J. Murray
 P. J. Walsh
 L. S. Robinson
 John Burns
 Mrs. John Burns
 Mary Crosson

IT IS FURTHER UNDERSTOOD AND AGREED that the said WALTER G. KLEINSCHMIDT, BENJAMIN F. BAUM and J. W. SULLIVAN each agree to supply one-third ($1/3$) of the necessary funds required to apply on the purchase price, or to operate the property, so that the funds so supplied from said WALTER G. KLEINSCHMIDT, BENJAMIN F. BAUM and J. W.

SULLIVAN, in equal amounts, will equal one hundred (100) per cent. of the funds so required. In the event that any of the said parties fail or refuse to supply his proportion of the required funds, when and as said funds are required as herein set forth, time being the essence of this requirement, then, and in that event, the other parties hereto shall have the right to pay such sums as are required, and in that event, any and all interests owned by said defaulting party in and to said agreement for sale of mining property, or in or to said property, shall be deemed forfeited; provided, however, that any and all moneys paid under and by virtue of said agreement shall be repaid to said defaulting party at the rate of five (5) per cent. of any and all profits produced by said property, after said property has been fully paid for, and good and sufficient deed conveying said property shall have been executed and delivered to the other two parties; or in the event of sale of said Camp Rock Placer Mine, said defaulting party shall be paid at the rate of twenty six and two-thirds ($26\frac{2}{3}$) per cent. of the payment made under said sale until he has received an amount equal to the amount of money which he has supplied under this agreement.

IT IS UNDERSTOOD AND AGREED that each party hereto shall furnish such moneys as are required for payments on or before the 15th of the month in which said payment becomes due.

IT IS UNDERSTOOD AND AGREED that any and all moneys supplied by the said Walter G. Kleinschmidt, Benjamin F. Baum and J. W. Sullivan, and all moneys received from the sale of metal recovered from the said Camp Rock Placer Mine, shall be deposited in the Bank of Italy, Seventh and Olvie Streets Branch, Los Angeles,

California, to the joint account of the said Walter G. Kleinschmidt, Benjamin F. Baum and J. W. Sullivan, and instructions issued to the said bank that any and all checks drawn on the said account must be signed by all of the above said parties.

IT IS UNDERSTOOD AND AGREED that in order to provide for payment of current operating expenses of the said Camp Rock Placer Mine, an account shall be established in the Security First National Bank (Seventh and Grand Branch) of Los Angeles, California, in the name of a person selected and appointed by any two of said parties mentioned in this agreement.

IT IS UNDERSTOOD AND AGREED that all funds disbursed from either of the above said bank accounts shall be substantiated by receipted bills or vouchers.

IT IS UNDERSTOOD AND AGREED that any and all profits realized from the operation or sale of said Camp Rock Placer Mine shall be distributed as hereinbefore provided, at such time and in such amount as is mutually agreed between the parties to this agreement.

IT IS UNDERSTOOD AND AGREED that in order to administer the operations of the said Camp Rock Placer Mine from one source, the parties to this agreement hereby agree and consent to place in the jurisdiction of any one of the said parties to this agreement, this said administration, which shall include the employment of labor at not more than labor market rates unless otherwise mutually agreed upon, the purchase of supplies, tools

and equipment at reasonable prices, and the direction of the mining and milling operations on the Camp Rock Placer Mine. The selection and appointment of this administrator shall be made by any two of the said parties to this agreement.

IT IS UNDERSTOOD AND AGREED that no salaries or wages shall be paid to any of the parties to this agreement unless mutually agreed upon in writing by all of the said parties to this agreement.

IT IS UNDERSTOOD AND AGREED that an account record shall be continually and permanently maintained to show in intelligent detail all receipts and disbursements of funds received and disbursed under this agreement. All receipted bills and vouchers and all evidences of bank deposits and monthly bank statements shall be permanently retained unless otherwise mutually agreed in writing by all parties to this agreement.

The above said account record and other above-mentioned records shall be maintained by, or under the supervision of any person selected and appointed by any two of the parties to this agreement. It shall be the duty of the said person to issue each month a written statement of account showing the amount of receipts, disbursements, expenses, and losses, or profits for the previous month, and a copy of this statement shall be furnished to each and every one of the parties to this agreement.

IT IS FURTHER UNDERSTOOD AND AGREED that none of the parties hereto may sell, transfer or assign his interest in and to this agreement, or in and to said agreement for the sale of mining property hereinbefore mentioned, unless he has first offered his said in-

terest to the other two parties hereto at the same price which he would receive from the sale, assignment or transfer.

Witness	(Signed)	Walter G. Kleinschmidt
	(Signed)	W. G. Kleinschmidt
Lewis F. Deward	(Signed)	J. W. Sullivan
F. J. Murray	(Signed)	Benjamin F. Baum"

(Counsel representing all parties stipulated that the mining property described in the instruments involved in this case is commonly and popularly known as the Camp Rock Mine [p. 49].)

(Counsel representing all parties stipulated that of the sum of \$50,000, for which the Camp Rock Mine was sold, \$49,000 was paid by Mr. Llewellyn and Mr. Clinedinst to Mr. Kleinschmidt [p. 51].)

Whereupon, Mr. Wright, on behalf of Margaret D. Kleinschmidt, as Administratrix of the Estate of Walter Granger Kleinschmidt, deceased, and individually, made a motion to dismiss the cause against her. The court granted the motion with respect to the defendant Margaret D. Kleinschmidt individually and overruled the motion with respect to the defendant Margaret D. Kleinschmidt, as Administratrix of the Estate of Walter Granger Kleinschmidt, deceased.)

(Whereupon, Mr. Wright excepted to the denial of the motion to dismiss the cause as to Margaret D. Kleinschmidt, as Administratrix of the Estate of Walter Granger Kleinschmidt, deceased, and said exception was allowed.)

(Testimony of Margaret D. Kleinschmidt—Kent Blanche)

MARGARET D. KLEINSCHMIDT,

after being first duly sworn, testified as a witness in her own behalf substantially as follows:

I am one of the defendants in this case and one of the parties in this case. My husband died on November 23, 1935. I was not familiar with any of his business affairs. I did not know anything about this so-called Camp Rock Placer Mine. I knew that he was interested in it. I did not have any knowledge of any transactions leading up to the sale of this mine. I did not know anything about Mr. Baum's bankruptcy. Mr. Kleinschmidt never discussed the details of this bankruptcy with me.

(There was no cross-examination of the witness.)

KENT BLANCHE,

a witness called on behalf of the defendants, being first duly sworn, testified substantially as follows:

My name is Kent Blanche. I am an attorney at law and have been such since April of 1931, down to the present time. During April of 1931, through the entire year, I was acting in the capacity of attorney for Mr. Kleinschmidt concerning certain things to do with Camp Rock Mine. I am familiar with plaintiff's Exhibit 18 in this case. This is a document drawn by me. I revised a previous document to include the various terms that are included here. That document is the original agreement between Mr. Baum, Mr. Kleinschmidt and Mr. Sullivan for the purchase of this property.

(Testimony of Kent Blanche)

(It was stipulated by counsel that a document bearing date April 16, 1931, bore the signatures of Charles Pohl and Henry C. Stock. Whereupon, Mr. Wright offered a document and it was introduced in evidence as defendants' Exhibit A.)

“AGREEMENT FOR SALE OF MINING
PROPERTY.

THIS AGREEMENT, made the 16th day of April, A. D. 1931, between HENRY C. STOCK and CHARLES POHL, both of Los Angeles in Los Angeles County, State of California, hereinafter called the ‘VENDORS’, and J. W. SULLIVAN of Los Angeles, Los Angeles County, State of California, hereinafter called the ‘PURCHASER’

WITNESSTH:—

That in consideration of the covenants and agreements on the part of the purchaser hereinafter contained, the said VENDORS agree to sell and convey to the said PURCHASERS, and the said PURCHASERS AGREE to buy, those certain mining claims and properties located in the County of San Bernardino, State of California to-wit:

ROYAL PLACER CLAIM Number 1;
ROYAL PLACER CLAIM Number 2;
ROYAL PLACER CLAIM Number 3;
ROYAL PLACER CLAIM Number 4;
ROYAL PLACER CLAIM Number 5;
ROYAL PLACER CLAIM Number 6;

(Testimony of Kent Blanche)

ROYAL PLACER CLAIM Number 7;

ROYAL PLACER CLAIM Number 8;

ROYAL PLACER CLAIM Number 9;

and also those certain Quartz Mining claims located and described as GOLD JUNCTION: GOLD BAR number 1 and GOLD BAR Number 2;

all of said mining claims being located in the BELVILLE MINING DISTRICT in the County of San Bernardino, State of California, as said claims are described in the NOTICES OF LOCATION thereof filed in the office of the Recorder of San Bernardino County, State of California, to which said notices of location reference is hereby made for a more full and particular description thereof.

For the sum of TWENTY THOUSAND (\$20,000.00) Dollars, current lawful money of the United States, to be paid as follows, namely: ONE THOUSAND DOLLARS CASH, at the execution of this agreement, of which \$500.00 is to be paid to each of said Vendors; and a ROYALTY of seven and one-half (7-1/2%) per cent of the gross gold produced therefrom each month, payable to each of said VENDORS (being a total royalty of 15%) on the sixteenth day of each calendar month after the date of this agreement; provided, however that the deferred payments shall not be less than five hundred dollars each month to each of said Vendors (or a total of \$1000.00 per month) until the full purchase price of \$20,000.00, to-wit \$10,000.00 to each of the vendors shall have been paid.

And it is mutually covenanted and agreed that the purchaser shall be let into, and have immediate possession of

(Testimony of Kent Blanche)

said mining claims and of all personal property, machinery and appliances thereon which belong to said Vendors; that time shall be of the essence of this contract; and that if the said PURCHASER shall fail to pay the said installments or any of them when due, at the minimum rate of \$500.00 each month to each of the Vendors, and the indebtedness of \$1800.00 owing to Mrs. Emma Heilman within thirty (30) days hereof, the said vendors and each of them shall be released from all obligation, both at law and in equity, to convey said property; and, in such event, the purchaser shall forfeit all right to said property, and all payments theretofore made by him shall be forfeited to the said vendors.

The said Vendors, upon receiving the payments at the time and in the manner hereinbefore specified, and upon payment by the purchaser of said \$1800.00 due to Mrs. Emma Heilman, within thirty (30) days from the date hereof agree to execute and deliver to said purchaser, or his assigns, a good and sufficient deed of conveyance, conveying the title to said property, subject to liens and encumbrances of record on December 10, 1930 and subject to said indebtedness of \$1800.00 due from Henry C. Stock to Mrs. Emma Heilman. Vendors shall, simultaneously with the execution of this agreement, make a joint deed of said property to purchaser, and place the same in escrow with a depository to be mutually agreed upon, with instructions to deliver the same to purchaser upon full payment of the said purchase price, plus said indebtedness of \$1800.00 owing to said Emma Heilman.

In event this contract is forfeited for default in payments thereon the Vendors shall have the benefit of all

(Testimony of Kent Blanche)

work done on said property by purchasers prior to such default and Vendors may record proof thereof and have the benefit thereon on account of assessment work on such claims.

IN WITNESS WHEREOF the said parties have hereunto set their hands this 16th day of April, 1931.

(Signed) Henry C. Stock J W Sullivan

Vendors

Charles Pohl

Purchaser

STATE OF CALIFORNIA)

) SS.

County of Los Angeles)

On this 16th day of April, 1931, before me, Lewis Cruickshank, personally appeared HENRY C. STOCK, CHARLES POHL and J. W. SULLIVAN, known to me to be the persons whose names are subscribed to the within instrument and severally acknowledged that they executed the same.

IN WITNESS whereof I have hereunto set my hand and affixed my official seal.

(SEAL) (Signed) Lewis Cruickshank

Notary Public in and for the said County and State.

My Commission Expires May 18, 1933"

The signature on an assignment dated September 23, 1931, is the signature of B. F. Baum.

(Testimony of Kent Blanche)

(Whereupon, Mr. Wright offered the assignment in evidence and the same was introduced in evidence as defendants' Exhibit B.)

"ASSIGNMENT

IN CONSIDERATION that WALTER G. KLEIN-SCHMIDT has agreed and does hereby agree to supply one-third ($1/3$) of the necessary funds to comply with that certain agreement for the sale of mining property executed on the 16th day of April, 1931, by Charles Pohl and Henry C. Stock, as Vendors, and J. W. Sullivan, as Purchaser, said agreement being recorded in Book..... Page..... of the Official Records of the County Recorder of the County of San Bernardino, State of California; said agreement being for the sale and purchase of the following described property situated in the Belleville Mining District, County of San Bernardino, State of California, towit:

'Royal Placer Claim No. 1', 'Royal Placer Claim No. 2',
'Royal Placer Claim No. 3', 'Royal Placer Claim No. 4',
'Royal Placer Claim No. 5', 'Royal Placer Claim No. 6',
'Royal Placer Claim No. 7', 'Royal Placer Claim No. 8',
and 'Royal Placer Claim No. 9', all as situated in Section 28, Township 7 North, Range 3 East, S. B. B. & M. in said County and State;

Also including the following placer claims in said district of said County and State:

'Gold Junction,'
'Gold Bar No. 1'
'Gold Bar No. 2'

(Testimony of Kent Blanche)

Also including that certain placer and water rights claim, containing about 160 acres and known as the 'Sullivan Placer Claim' situated in said Belleville Mining District, said County and State, Section 30, Township 7 North, Range 3 East, S. B. B. & M. and for other good and valuable consideration, I, B. F. BAUM, do hereby assign, transfer and set over unto WALTER G. KLEIN-SCHMIDT, twenty-six and two-thirds (26-2/3%) per cent. of all of the right, title and interest of the purchaser, as set forth herein.

(Signed) B. F Baum

Subscribed and sworn to before me this 23 day of September, 1931.

(Signed) Freda R. Paulson

Notary Public in and for the County of Los Angeles,
State of California.

STATE OF CALIFORNIA,)

) ss.

County of Los Angeles)

On this 23rd day of September, A. D., 1931, before me, Freda R. Paulson, a Notary Public in and for said County and State, personally appeared B. F. Baum, known to me, (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

(Testimony of Kent Blanche)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(NOTARY SEAL)

(Signed) Freda R. Paulson

Notary Public in and for said County and State."

I knew one J. W. Sullivan in his lifetime. He is now deceased. I knew him fairly well. I have not seen him for any length of time. As I recall, he died some time in 1934 or 1935. He is not available to testify in this action at the present time. The signature on the document I have in my hand dated August 22, 1931, is in his handwriting. The acknowledgment to his signature was taken before me as a notary public.

(Whereupon Mr. Wright offered the assignment and it was received in evidence as defendants' Exhibit C.)

"ASSIGNMENT

IN CONSIDERATION that WALTER G. KLEIN-SCHMIDT has agreed and does hereby agree to supply one-third ($1/3$) of the necessary funds to comply with that certain agreement for the sale of mining property executed on the 16th day of April, 1931, by Charles Pohl and Henry C. Stock, as Vendors, and J. W. Sullivan, as Purchaser, said agreement being recorded in Book 710, Page 387 of the Official Records of the County Recorder of the County of San Bernardino, State of California;

(Testimony of Kent Blanche)

said agreement being for the sale and purchase of the following described property situated in the Belleville Mining District, County of San Bernardino, State of California, to-wit:

'Royal Placer Claim No. 1,' 'Royal Placer Claim No. 2,'
 'Royal Placer Claim No. 3,' 'Royal Placer Claim No. 4,'
 'Royal Placer Claim No. 5,' 'Royal Placer Claim No. 6,'
 'Royal Placer Claim No. 7,' 'Royal Placer Claim No. 8,'
 and 'Royal Placer Claim No. 9' all as situated in Section 28, Township 7 North, Range 3 East, S. B. B. & M. in said County and State;

Also including the following placer claims in said district of said County and State:

'Gold Junction,'
 'Gold Bar No. 1'
 'Gold Bar No. 2'

Also including that certain placer and water rights claim, containing about 160 acres and known as the 'Sullivan Placer Claim' situated in said Belleville Mining District, said County and State, Section 30, Township 7' North, Range 3 East, S. B. B. & M.'

and for other good and valuable consideration, I, J. W. Sullivan, do hereby assign, transfer and set over unto WALTER G. KLEINSCHMIDT, thirty-three and one-third ($33\frac{1}{3}$) per cent of all of the right, title and interest of the purchaser, as set forth herein.

(Signed) J W Sullivan

(Testimony of Kent Blanche)

Subscribed and sworn to before me this 22nd day of August, 1931.

(Signed) E. M. Sullivan

Notary Public in and for the County of Los Angeles,
State of California.

STATE OF CALIFORNIA,)

) ss.

County of Los Angeles)

On this 22nd day of August, A. D., 1931, before me, Victor Russell Hansen, a Notary Public in and for said County and State, personally appeared J. W. Sullivan, known to me, (or proved to me on the oath of Kent Blanche), to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notary Seal) (Signed) Victor Russell Hansen

Notary Public in and for said County and State."

I made records of the payments made by the parties to the original agreement, Mr. Sullivan, Mr. Baum and Mr. Kleinschmidt. I have these records. My relationship to these gentlemen was that I was acting as attorney for Mr. Kleinschmidt. The document which I have in my hand is in my handwriting and was prepared by me. I prepared it from the records which I then had. These records consisted of my own personal records concerning

(Testimony of Kent Blanche)

payments which I personally had made and information which I had derived from other sources concerning payments which I had not made. Without referring to that document at all, I am able to tell the court what payments were made by the various parties to this action. Referring to that document to refresh my recollection, I am still able to do it. I am not certain when the last payment was made by Mr. Baum for the purchase of the Camp Rock mining property. I know of my own knowledge that no payment was made in October by him, because I personally received the full amount of moneys from Mr. Kleinschmidt and from Mr. Sullivan and made the payments. Prior to that time I know that Mr. Baum had not made one or two payments, or just how many I don't know. He had previously been in default. I don't believe he was in default in July, 1931. To the best of my recollection, his first payment missed was in September, 1931. I know from a great many sources that Mr. Sullivan paid in \$3260, because that was a source of subsequent litigation, and one of the witnesses heretofore was the assignee of that interest. I know that he paid in that amount, and that amount shows a default in November, 1931, on his part, leaving Mr. Kleinschmidt to make the entire payments.

“Q BY MR. WRIGHT: [p. 86] Now, did you have any conversation with Mr. Sullivan about his ability to continue to make these payments?”

(Whereupon, Mr. Turnbull, counsel for plaintiff, objected to the question, and after argument by counsel the same was overruled and an exception was noted and allowed.)

(Testimony of Kent Blanche)

“Q BY MR. WRIGHT: [p. 89] What did he tell you, Mr. Blanche?

A He told me he couldn't make the November payment.”

I did not know Mr. Baum's financial condition of my own knowledge in August, 1931.

(Whereupon, Mr. Wright handed the witness a document and counsel for plaintiff stipulated that the instrument bore the signature of Mr. Sullivan.)

I do not know whether Mr. Kleinschmidt received this instrument from Mr. Sullivan.

(Whereupon, Mr. Wright offered the instrument in evidence, to which offer counsel for plaintiff objected on the ground that the document was a self-serving statement concerning the defendant Sullivan and cannot bind the plaintiff in any way, and further that the same was dated after the date of the Baum bankruptcy and can in no way affect the title to the property in question as custodia legis.)

(Whereupon, the same was admitted in evidence as defendants' Exhibit D, and an exception was taken and allowed.)

(Testimony of Kent Blanche)

“EQUITABLE ASSURANCE CO.
313 WALTER P. STORY BUILDING
PHONE VA. 8749
610 SOUTH BROADWAY LOS ANGELES, CALIF.

December 14th, 1931.

Mr. Walter G. Kleinschmidt
San Francisco, Calif.,

Dear Sir:

This is to certify that I am unable to meet my prorata payment in re Camp Rock Mines which is due on the 16th instant and that this is your authorization to make said payment in my behalf and in my stead and that upon you making said payment in my behalf I hereby authorize and acknowledge that our agreement between ourselves regarding said failure on my part to meet my quota when due shall automatically grant you a transfer of all my interest in said property subject to reimbursing me in the event of a sale of said mine as per the terms of our said agreement.

Very truly yours,

(Signed) J W Sullivan

Witness Louis N Elin Jr”

(Whereupon, the court recessed until 1:30 o'clock.)

(Testimony of Kent Blanche)

At the commencement of the trial, Mr. Blanche was again called to the stand.

(Whereupon, it was stipulated by counsel that there was admitted as part of plaintiff's case in chief, plaintiff's Exhibit 19, which was the discharge in bankruptcy as made by the Hon. Paul J. McCormick, on the 4th day of April, 1932, in the matter of Benjamin F. Baum, a bankrupt.)

(Whereupon, it was further stipulated that the following document might be admitted in evidence as plaintiff's Exhibit 20.)

“AGREEMENT FOR SALE OF MINING PROPERTY.

THIS AGREEMENT, made and entered into by and between WALTER G. KLEINSCHMIDT of the City of San Francisco, State of California, hereinafter called Vendor, and FRANK LLEWELLYN, of the City of Los Angeles, hereinafter called Vendee,

WITNESSETH:

That in consideration of the covenants of the parties hereto hereinafter contained, the said Vendor agrees to sell and convey to the Vendee, and Vendee agrees to purchase those certain mining properties located in the County of San Bernardino, State of California, and more particularly described as follows to wit:

Royal Placer Claim Number 1, as per description recorded in Book 171, Page 64, Mining Records.

(Testimony of Kent Blanche)

Royal Placer Claim Number 2, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 3, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 4, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 5, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 6, as per description recorded in Book 171, Page 67, Mining Records.

Royal Placer Claim Number 7, as per description recorded in Book 171, Page 68, Mining Records.

Royal Placer Claim Number 8, as per description recorded in Book 171, Page 68, Mining Records.

Royal Placer Claim Number 9, as per description recorded in Book 171, Page 69, Mining Records.

Gold Junction Quartz, as per description recorded in Book 163, Page 189, Mining Records.

Gold Bar No. 1, as per description recorded in Book 168, Page 183, Mining Records.

Gold Bar No. 2, as per description recorded in Book 168, Page 183, Mining Records.

The purchase price to be paid for said property shall be in the amount of FORTY-NINE THOUSAND DOLLARS (\$49,000.00) in lawful money of the United States, to be paid by the Vendee to the said Vendor upon the terms as hereinafter stated, to-wit:

(Testimony of Kent Blanche)

One Thousand Dollars (\$1000.00) upon the execution of this agreement;

One Thousand Dollars (\$1000.00) on June 1st, 1932;

Five Thousand Dollars (\$5000.00) on July 1st, 1932, and in installments thereafter at the rate of fifteen per cent (15%) of the gross mineral products produced from said property with a minimum guarantee of One Thousand Dollars (\$1000.00) per month until the full purchase price has been paid.

It is particularly understood and agreed that the terms hereof shall be without grace save and except as regards the payment of June 1st, 1932, with reference to which payment the said Vendee shall have a period of eight (8) days grace. All payments thereafter shall be made on the first day of each and every calendar month.

It is particularly understood and agreed that in the event said Vendee desires to complete the payment of the purchase price of said mining property at any time before the payment thereof becomes due under the terms hereinbefore set forth, that the same may be done, in which event said Vendee will be allowed a deduction of six per cent (6%) from the then remaining unpaid purchase price.

It is particularly understood and agreed that all title charges will be paid by the Vendee but may thereafter be deducted from the payment falling due under the terms of this agreement out of July 1st, 1932.

(Testimony of Kent Blanche)

It is further understood and agreed that any failure to pay any installment of the purchase price shall constitute an immediate forfeiture on the part of said Vendee, and the said Vendor shall be released from all obligations both at law and in equity, to convey said property, and in such event the Vendee shall forfeit all right to said property and all payments theretofore made by said Vendee shall be forfeited to the said Vendor, and in the event of such forfeiture, said Vendee shall be relieved from all further payments on account of said purchase price.

It is understood and agreed that an accounting of all mineral products shall be continuously and permanently maintained to show in intelligent detail all revenue derived from the operation of said property hereinbefore described, and all Treasury receipts and vouchers shall be permanently retained by the said Vendee. The Vendor will at any time upon request, be furnished with a complete and full accounting of all the revenue derived from the said property, and said Vendor may furthermore verify said accounting with the accounts of said Vendee.

It is further understood and agreed that said Vendee may deposit any and all payments on account of the purchase price with depository in Los Angeles, California, said depository to be designated by the said Vendor.

The said Vendor agrees to convey by proper deeds a good and sufficient marketable title to said property free and clear of any incumbrances whatsoever.

(Testimony of Kent Blanche)

It is particularly understood and agreed that the said vendor does not warrant or guarantee title as to any of the personal property now located on the property hereinbefore described, but does hereby sell and convey all of his right, title and interest in and to said property, and further agrees to hold the said Vendee free and harmless from any litigation or from the costs thereof, which may arise out of or concerning the title to said personal property, it being fully understood and agreed that should any valid or subsisting claims be advanced against any of said property, that said Vendee may purchase the same or deliver to the real owner thereof at their pleasure.

It is further understood and agreed that said Vendee will pay any and all taxes assessed against said property during the term of this agreement, and will do all necessary assessment work in the time provided by law therefor.

It is further understood and agreed that said Vendor will pay any and all incumbrances now existing against said property within a sufficient time as to not hazard the interests of said Vendee.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 10th day of May, 1932.

VENDOR

(Signed) Frank Llewellyn
Vendee

(Testimony of Kent Blanche)

STATE OF CALIFORNIA,)
) ss.
 County of Los Angeles)

On this 18th day of May, A. D., 1932, before me, Jewell B. Hudson, a Notary Public in and for said County and State, personally appeared Frank Llewellyn, known to me, (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) (Signed) Jewell B. Hudson
Notary Public in and for said County and State.”

FURTHER TESTIMONY BY

MR. BLANCHE.

I am familiar with the action entitled Kleinschmidt vs. Grubl. I was one of the attorneys of record in that case. I represented Mr. Kleinschmidt in that case. The nature of that case was that these Camp Rock placer claims and the Quartz claims, in 1932 or 1933, were jumped by a number of people headed by Grubl, and an action was brought in the Superior Court of San Bernardino County for the purpose of acquiring title as against these claim jumpers. At that time these claim jumpers were attacking the original title of Mr. Kleinschmidt on the basis that his original title was defective for various reasons, such as the original locations having included too much terri-

(Testimony of Kent Blanche)

tory, improper location notices having been filed, and improper descriptions. The subject matter of that action was the very property in dispute in this case.

(Whereupon, counsel offered a certified copy of the judgment in the case of Kleinschmidt v. Grubl in evidence and an objection to its introduction was sustained.)

FURTHER TESTIMONY BY

MR. BLANCHE.

Prior to October, 1931, I did a few preliminary things relating to the Camp Rock Mine transaction for Mr. Kleinschmidt and from that time on I acted more or less in a general capacity for Mr. Kleinschmidt. Mr. Kleinschmidt at no time or from the time I acted for him made any statement to me that he had conspired and agreed with Baum or anybody else to cheat or defraud Baum's creditors. Mr. Baum did not make any such statement to me. I never had of my own knowledge any reason to suspect that any of the transactions which we have gone into here this morning were done for the purpose of defrauding the trustee in bankruptcy or Mr. Baum's creditors, and I am convinced they were not made for that purpose. These gentlemen, during this whole transaction, were perfectly free in discussing their matters with me and I was familiar with everything they did. I knew of the existence of all these documents at the time. These assignments were recorded at my request. When these assignments were recorded, I did not know that Mr. Baum was going through bankruptcy. I did not act for him in his bankruptcy matters.

(Testimony of Kent Blanche)

CROSS-EXAMINATION

BY MR. TURNBULL

I did not suspect anything was wrong about these things. I have been an attorney since November, 1927. I knew that Mr. Baum attained the status of a bankrupt about November, 1931, but when that knowledge came to me, I don't recall. I knew that he executed a quitclaim deed to Mr. Kleinschmidt after his bankruptcy. The document I am referring to is plaintiff's Exhibit 11, and is an instrument dated February 29, 1932. I knew of the recording of the deed which I prepared. At that time my knowledge was rather indefinite as to the date Mr. Baum had been declared a bankrupt, but it is my opinion now that I then knew that he had previously been adjudicated, or was mixed up in some bankruptcy proceedings. I am familiar with section 70 of the Bankruptcy Act that title to all property of choses in action passes to a trustee in bankruptcy if he is adjudicated if he has any title. The first time that I ever acted specifically as attorney for Mr. Baum was when I called you [Mr. Turnbull] in regard to a continuance of a hearing, Mr. Baum having been subpoenaed in Salinas to appear in this court to take a deposition after the reopening of his bankruptcy discharge. We got a continuance of at least a month. Prior to that time I never discussed anything with him regarding the Camp Rock Mine so that I felt justified in sending a bill.

(Testimony of Kent Blanche)

(Whereupon Mr. Turnbull showed the witness a letter purporting to be written by him on December 10, 1932.)

This letter is in my handwriting. This is my signature and this is my letterhead. I would say that I wrote the letter and sent it to the person to whom it was addressed. I would not say that this refreshes my memory that I was acting for Mr. Baum in 1932. I do not recall whether the letter refers to an assignment of certain interests Mr. Murray had to receive profits in and to that which he had assigned to Mr. Baum, and was subsequently assigned to him.

(Whereupon the letter was offered and admitted in evidence as plaintiff's Exhibit 21.)

[The letter is addressed to Mr. Frank Murray, 524 Wilcox Building, Los Angeles, and dated December 10, 1932. It reads:]

"Mr. Murray:

This is to advise you that I have received word from Mr. Kleinschmidt that you will not receive the \$75.00 this month as expected, as Mr. Baum had objected to the payment until the matter of the interest had been taken care of.

Very truly yours,

(Signed) Kent Blanche."

(Whereupon the witness stipulated on behalf of his client that photostats of the exhibit and the writing on the reverse side may be used in evidence.)

(Testimony of Kent Blanche)

I do not know who wrote this on the reverse side of the letter. I don't feel qualified to recognize Mr. Baum's signature. I have never seen it before.

(Whereupon, it was stipulated that Mr. Baum, who was in court, stated that it was his signature [p. 118].)

(Whereupon, the court allowed counsel to have the photostat marked and withdraw the original.)

I do not know how this got on the back of my letter. It wasn't there when I wrote it.

(Whereupon there was offered in evidence plaintiff's Exhibit 22, and counsel for defendants Baum and Kleinschmidt objected to the introduction of the same and said objections were overruled and the same was admitted in evidence.)

PLAINTIFF'S EXHIBIT 22.

"March 1st, 1933.

"Murray:

"Llewellyn has a thirty-day extension from March 1st, 1933. If no payment is made on April 1st, we be willing to accept \$13,000 net cash for property. All interests, etc., Sullivan and 20% profits to be paid by you. If any cash settlement with Llewellyn is made before April 1st, you are to get all moneys over \$13,000 before April 1st.

B. F. Baum.

(Testimony of Kent Blanche)

“Remarks by Murray:

“This was written and given to me at the restaurant adjoining telephone building on Olive Street, Los Angeles.

“KENT BLANCHE, Attorney at Law

“740 South Olive Street,

“Los Angeles, California,

“Tucker 0126

“Dec. 10th, 1932

“Mr. Frank Murray,

“524 Wilcox Bldg.,

“L. A.

“Mr. Murray:

“This is to advise you that I have received word from Mr. Kleinschmidt that you will not receive the \$75.00 this mo. as expected, as Mr. Baum had objected to the payment until the matter of the interests had been taken care of.

“Very truly yours,

“Kent Blanche.

“Remarks by Murray:

(Greatly obliterated photostat attached, with the following legible words and figures):

“1174— W 74 St

“3500.00—500

“4421 S Van Ness 3200.00

“I couldn't reach him his Phone disconnected.”

(Testimony of Kent Blanche)

The first time that I knew the date of discharge in bankruptcy of Mr. Baum was when we reopened the bankruptcy petition. I have no recollection of ever having known any specific date before. I did not know the date at the time Mr. Baum put through the sale for \$50,000 to Llewellyn that he had been discharged four days before. I knew of the assignment of Mr. Kleinschmidt to Mr. Baum of a 50 per cent interest in the Camp Rock proceeds when the assignment was made. I never knew that Mr. Kleinschmidt gave any considerable interest back to Mr. Baum. I knew that plaintiff's Exhibit 12 had been executed within two or three days after it was executed or at least dated. I presume I knew it within a few days after its date, November 15, 1932. I knew that the property had been forfeited by Mr. Baum and a half interest in the proceeds of the sale had been given to Mr. Baum. That did not raise any suspicion in my mind that there might be something peculiar in the relationships of Mr. Baum and Mr. Kleinschmidt getting a 50 per cent interest in the property that he had no interest in before. I prepared the agreement of the sale of this property in the first instance to Mr. Llewellyn. That agreement never said that Mr. Baum was supposed to get half of the money or \$25,000. I knew of the existence of plaintiff's Exhibit 12, dated November 15, 1932, at or within a few days after it was made. I know what that agreement provides. It provides that Mr. Baum is to receive 50 per cent of the profits derived from the sale of the mine, not 50 per cent of the proceeds. I knew about the instrument, although I did not prepare it. I think that the so-called default by Mr. Baum under the purchase contract with Sullivan and Kleinschmidt oc-

(Testimony of Kent Blanche)

curred in September. I am certain that I didn't receive any money from Mr. Baum either in August or September. I know that it occurred prior to that, but I undertook the payments. I knew at that time that Mr. Baum or Mr. Kleinschmidt were dealing with respect to the sale of that property with a man named Louis D'Elia. I recall an instrument dated August 8, 1931. I know Louis D'Elia. I do not know the signature of Louis D'Elia, Jr. I did not know that negotiations had gone so far that in August a written agreement had been signed by Baum and Mr. Kleinschmidt and Mr. D'Elia for fixing a price for the sale of that property.

(Whereupon plaintiff's Exhibit 23 was marked for identification.)

PLAINTIFF'S EXHIBIT NO. 23.

"MEMORANDUM OF AGREEMENT.

THIS AGREEMENT made and entered into this 18th day of August, 1931, at Los Angeles, California, by and between Benjamin F. Baum, Walter G. Kleinschmidt, and J. W. Sullivan, hereinafter designated as First Parties, and Louis F. D'Elia, Jr., hereinafter designated as Second Party:

WITNESSETH:

That in consideration of the payment to First Parties of the sum of one dollar (\$1.00) by Second Party, and other valuable considerations, and of the covenants and

(Testimony of Kent Blanche)

agreements hereinafter set forth, the Parties have agreed together as follows:

I

The First Parties are the owners, by mining location, of the lands hereinafter described.

II

That they do hereby lease and give and grant to Second Party the exclusive right and title to go upon said property, explore for and mine and use the ore and minerals thereon, and for such purposes use the premises in such manner as shall be reasonably necessary; erect and maintain manufacturies, machinery or other appliances thereon; construct and maintain roads and tracks thereon, and use said property in every way for the purposes of this contract; that he may, with the written consent of the first parties only first had and obtained, sublease or sell or assign all or any part of the rights granted under this contract, or contract with others to carry on the work contemplated hereby, but no sale, transfer, sub-lease or assignment shall relieve the said Second Party or the said land from the obligation of full performance of the covenants hereof, but the same shall carry with it only the rights and privileges herein granted to said party of the Second Part.

The Second Party may terminate this contract, so far as it requires him to mine or manufacture the product found on said property, or to pay royalty therefor, or taxes thereon, by giving thirty days (30) written notice of such termination to the Parties of the First Part, or their personal representatives, such notice to be given either in person or deposited in the United States Post

(Testimony of Kent Blanche)

Office, postage fully prepaid thereon, addressed to the First Parties at the address then designated in writing as the place for payment of royalties hereunder, and that the expiration of said thirty (30) days this agreement shall be terminated upon the adjustment, settlement and satisfaction of all accounts between the Parties to said date.

III

That at the date hereof the Second Party will go and/or remain upon the premises for the purpose of mining and manufacturing the product thereon; it being agreed that the object of this contract is the mining, manufacturing and handling of the placer gold and other minerals believed to be upon said premises. That he will pay to the First Party an amount equal to fifteen per cent (15%) of the total gross amount of mineral product mined, recovered or realized from said property during the full term of the lease.

That upon First Parties receiving the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) from the Second Party or his assigns or successors in interest, in payments of fifteen per cent (15%) royalty as hereinabove set forth, said First Parties or their successors in interest shall convey by deed or otherwise, all of their right, title and interest in and to all of said property to Second Party, his assigns or successors in interest and that all subsequent payment of said royalty shall terminate and that all rights in said property shall be vested exclusively, free and clear of all claims of any kind or character, in said Second Party or his assigns or successors in interest.

(Testimony of Kent Blanche)

That the failure on the part of the said Second Party to mine, manufacture or extract the mineral product from the mine or ore hereinabove set out, and/or to make said payments shall constitute a breach of this contract, and this contract shall be forfeited at the option of the First Parties hereto, and all rights of the Second Party shall cease and determine.

The total amount of mineral product received from the property monthly shall be ascertained by reference to the mill, mint or smelter returns therefor, as the case may be, dependent upon the character of the mineral product involved; and the Parties hereto may resort to such other data as they shall determine.

IV

The Second Party further agrees that he will pay, or cause to be paid, deliver or cause to be delivered, to First Parties, fifteen per cent (15%) of the gross output of said property, as ascertained, and that such payments shall be made as in Paragraph III set out on the tenth day of each month, as royalty for the next preceding month, and that the Second Party, at the time of each payment, shall transmit to First Parties an exact and truthful statement of the amount of product produced, taken or derived from such property, and an exact and truthful statement of the mill, mint or smelter returns or reports thereof, the rights however, being conceded and retained in the First Parties to inspect and review and test the correctness of said statement at any reasonable time and in such reasonable manner as they may wish to adopt; it being agreed that any errors in any respect, when ascertained, shall be recognized, corrected, settled and paid between the Parties.

(Testimony of Kent Blanche)

V

The Second Party shall during the life of this contract, pay all taxes or assessments, general or specific, levied upon said land or the machinery or improvements thereon, not including United States income tax, which may be assessed against the interest of the First Parties hereto, and pay the same before the date fixed therefor by law, during the continuance of this contract; provided that the Second Party may contest the legality of any of said taxes or assessments, and the non-payment thereof for the purpose of such contest shall not be considered a breach of this contract, or work a forfeiture thereof. The Second Party shall at all times keep said property free and clear from all liens, encumbrances or claims arising by, through or from any act or omission of the Second Party or any one acting by, through or under him.

VI

Anything herein contained to the contrary notwithstanding, the uninterrupted right of the Second Party to take, use and market the product mined or produced hereunder, as herein stipulated, shall continue unsuspending notwithstanding any disagreement between the Parties hereto, respecting the same, or this contract, so long as the Second Party shall pay to the First Parties, at the time or times and in the manner stipulated for, the amount of royalties and/or rents accruing hereunder, and otherwise comply with the provisions hereof and the payment of taxes and assessments.

VII

The Second Party covenants and agrees to and with the First Parties that he will not, by himself or through

(Testimony of Kent Blanche)

his agents, sub-lessees, assignees, or any one holding through, by, or under him herein, do or neglect to do any act or thing which will charge the premises hereby leased, or jeopardize the interests or rights of the First Parties herein; that he will at all times carry ample insurance against accident or injury to employes for the protection of the First Parties and of said premises; that he will carry on the working of said premises, in a good and workmanlike and minerlike manner, and in strict compliance with the laws of the State of California applicable thereto; and the First Parties expressly reserve to themselves, and the Second Party agrees that the First Parties shall have, the right by themselves, their agents or servants, at all reasonable times, to enter upon or into any part or parts of the premises hereby leased, or any of the structures made thereon or workings therein, owned or operated by the Second Party, his successors, sub-lessees or assigns, in the mining and producing of the products herein contemplated, and inspect and survey the same, measure and weigh the quantity of mineral or material taken from said property, or manufactured thereon, not, however, unnecessarily interfering with or hindering or obstructing the operations of the Second Party; that they shall at any reasonable time have access to all books and returns from mints or smelters or others connected with the said property or operating on any of the products thereof; and that the Second Party will aid the First Parties in any reasonable investigation which said First Parties may wish to make in the foregoing connection or connected with this contract.

(Testimony of Kent Blanche)

VIII

The covenants, terms, agreements and conditions herein contained shall run with the land, inure to the benefit of, and be in all respects binding and operative upon the heirs, executors, sub-lessees, sub-contractors, grantees, successors and/or assigns of the respective Parties hereto.

IX

The lands, mining locations and premises hereby leased to the Second Party are all of those certain placer claims situate in the Bellville Mining District, San Bernardino County, State of California, a more particular description being set out in Exhibit A hereto attached, hereby referred to and made a part hereof for greater particularity. All personal property such as tools now on the premises may be used by the Second Party during the life of this contract, and it is part of the consideration hereof that if this lease shall be forfeited, that Second Party shall furnish to the First Parties full information as to all work and explorations made by him on said property; and that all improvements, machinery, pumps and other appliances, excepting automobiles, tractors and trucks used by him thereon, all water explorations and/or wells and easements for or titles thereto, made or sunk by him, whether located on said property or other property, shall become the property of the First Parties hereto at the time of such forfeiture.

IT IS AGREED, that the title to said property is now held as herein set out, and that the First Parties shall permit the work done upon said properties by the Second Party for and on behalf of the First Parties, to be done for and on behalf of the First Parties, and permit the

(Testimony of Kent Blanche)

same to be used under the law in so far as it is legal thereto as future assessments upon said property for the purpose of maintaining the title thereto under the mining laws as mining locations; and the Second Party agrees to furnish to First Parties, as required by them, such affidavits and proofs of work as shall be required by law for the purpose of proving such assessment work from time to time, and of complying with the mining laws in relation thereto; and it is further agreed that if the First Parties neglect to take any necessary steps in filing notice of assessment work done, or in any other matter affecting or tending to affect the title to such lands, that then the Second Party may, at his own cost and expense, but in the name of and for the use and benefit of the said First Parties, and as a protection of the Second Party's rights hereunder, cause such steps to be taken to remedy any such defect, and in so acting the said Second Party shall be deemed to be and shall be the agent of the First Parties herein, but no such act or acts shall cumber or cloud the title of the First Parties to said land.

X

IT IS FURTHER AGREED that if the rents royalties, payments or product derived from said property shall be unpaid or undelivered in violation hereof, or remain unpaid after the days and times when by the preceding covenants the same shall be paid, and if the same or any payments provided hereunder remain in default for more than thirty (30) days, this contract shall at the option of the First Parties cease and determine and all rights of the Second Party or those holding under him, shall end without notice; or if the Second Party shall fail to keep

(Testimony of Kent Blanche)

and perform any of the other covenants and conditions herein expressed to be kept or performed on his part, for the period of thirty (30) days after demand in writing by First Parties, or the personal representative of either of them, requiring the performance of such covenants and conditions, and stating the violation complained of, then and from thenceforth, and in either of these events, it shall be lawful for the First Parties, or either of them, or the personal representative of either of them, to take and repossess themselves of all rights herein granted or contemplated, and the Second Party, and all persons claiming by, through or under him, to wholly exclude therefrom, and that in case of such forfeiture it is agreed that the Second Party shall promptly remove from said premises all automobile tractors and trucks hereinbefore described in paragraph IX hereof, which are not placed thereon as fixtures, within fifteen (15) days after the forfeiture and termination of said contract and his rights thereunder; and that if he shall fail to so remove same, that any thereof left, being or remaining upon said property after the termination of said fifteen (15) days, shall be and become the property of the First Parties, and that all moneys paid hereunder shall also be forfeited to the First Parties, and be and become their sole and exclusive property, not as a penalty, but as a part consideration for the use of said property and for this contract.

XI

The royalties and other moneys herein stipulated to be paid shall be paid to the said First Parties as their respective interests shall appear, at such bank or banks as may be by said First Parties, or their heirs or assigns, re-

(Testimony of Kent Blanche)

spectively, from time to time designated, by notice in writing to the Second Party, and in proportion to the respective interests of the Parties, which are hereby declared and agreed to be as follows, to-wit: Benjamin F. Baum, Walter G. Kleinschmidt and J. W. Sullivan as co-partners.

XII

All notices provided for in this agreement may be served on the respective Parties, by depositing the same in the United States Post Office in a sealed envelope, postage fully prepaid thereon, and addressed to the party for whom the same is intended, at such address as shall be furnished by them from time to time, in writing, and if no address is so furnished the same may be addressed to the First Parties at 814 Central Bldg. and to the Second Party at 405 Washington Building, Los Angeles, California, and such shall be deemed to be served at the date of the posting thereof, and the time shall then begin to run.

XIII

That said Second Party, as evidence of good faith that said operations are to be started and continued for the purpose of establishing an up-to-date, modern plant, fully equipped for the purpose of treating and handling of the ores and precious metals recovered from the property, that said Second Party will agree to expend a minimum of Ten Thousand Dollars (\$10,000.00) representing reasonable value therefor, within thirty (30) days from date of said lease and an additional Ten Thousand Dollars (\$10,000.00) within sixty days (60) from date thereof, and thereafter operate, mine and refine a minimum of three

(Testimony of Kent Blanche)

thousand (3000) tons per month, and that should Second Party fail or neglect to expend said amount of money towards the improvement and development of said property or to show vouchers or receipts for said expenditures as hereinbefore set forth, and/or operate said mine at at least the minimum capacity of three thousand (3000) tons per month, that First Parties, at their option, may terminate and cancel all rights and obligations in and to said lease and that the interest of the Second Party shall thereupon terminate and be of no further force or effect.

XIV

That it is further understood and agreed by and between the Parties hereto that said First Parties are still indebted to the former owners of said property in the sum of Fifteen Thousand Dollars, this amount being payable at the rate of One Thousand Dollars per month until the full amount of said balance is paid. That should said First Parties default in the payment of any of the said installments or any part of said balance of said principal due to said former owners, that said Second Party shall be given the right to make said payments when due and upon making such payments shall give said First Parties thirty (30) days within which to compensate or repay said Second Party for said sum advanced or paid for the completing of the purchase of said property, and should said First Parties fail to reimburse Second Party for the amount paid for on their account for said purpose within said Thirty (30) days from the date of said notice, that the interest of said First Parties in and to said land and contract of purchase from the said former owners shall by these presents revert to Second Party and

(Testimony of Kent Blanche)

Second Party shall then be authorized to complete the payment of whatever balance there may be due from the First Parties to said original owners and all their right, title and interest of First Parties to the future payment of royalties from Second Party shall thereupon terminate and be forfeited for the benefit of said Second Party or his assigns or successors in interest, and that all the interest of said First Parties in and to said land and premises shall likewise terminate and cease and become the sole and absolute property of said Second Party.

XV

It is further understood and mutually agreed that this lease covers only the placer claims listed in exhibit A. The following quartz claims are exempt from this agreement and are and remain the property of the First Parties:

Gold Junction	Gold Bar No. 1	Gold Bar No. 2
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It is understood that the said First Parties will be given right and egress to enter upon the property covered by Exhibit A and to mine said claims without unnecessary interference with operations of the Second Party.

Said First Parties will further be allowed and permitted the use of water in the existing well for the operation of the quartz claims above mentioned, but Second Party may furnish water from other sources at his option in lieu of providing the use of the well now existing in the premises, it being understood however, that the amount of water to be provided will be at least equal to the capacity of the well.

(Testimony of Kent Blanche)

IN WITNESS WHEREOF, the said Parties hereto have hereunto set their hands and seals the day and year first above written.

Benjamin F. Baum
Walter J. Kleinschmidt
J. W. Sullivan

(COPY)

FIRST PARTIES

Louis F. D'Elia, Jr.
SECOND PARTY"

EXHIBIT "A"

ROYAL PLACER CLAIM NO. 1:

Commencing at the Southwest corner Section post and going 1320 feet north to a post marked North West Corner; thence 1320 feet East to a post marked North East Corner; thence 1320 feet South to a post marked South East Corner; thence 1320 feet to the point of beginning. This claim is situated in S. W. 1/4 of Section 28, T. 7, N. R. 3 E in Belville Mining District of San Bernardino County State of California. This claim contains 40 acres, or in other words a sixteenth part of a section, and shall be known as the Royal Placer Claim No. 1, and is about 12 miles North Easterly from Camp Rock to Newberry Springs; as recorded March 4, 1924, in Book 171 of Mining Records, Page 64, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 2:

Commencing at the South West Corner and going 1320 feet North to a post marked North West Corner; thence

(Testimony of Kent Blanche)

1320 feet East to a post marked North East Corner. Thence 1320 feet south to a post marked South East Corner. Thence 1320 feet to the point of beginning. This claim is situated in Section 28, N. W. 1/4 of S. W. 1/4 in T. 7, N. R. 3 E in Belville Mining District of San Bernardino County, State of California. The contents of this claim is 40 acres, or in other words, one sixteenth part of a section. This claim shall be known as The Royal Placer Claim No. 2; as recorded March 4, 1924, in Book 171 of Mining Records, Page 65, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 3:

Commencing at the South West Center Section Post and going 1320 feet North to a post marked North West Corner. Thence 1320 feet East to a post marked North East Corner. Thence 1320 feet South to a post marked South East Corner. Thence 1320 feet to the point of beginning. This claim is situated in S. W. 1/4 of N. W. 1/4 in Section 28, T 7, N. R. 3 E, in Belville Mining District of San Bernardino County, State of California, and shall be known as the Royal Placer Claim No. 3, and about 2-1/2 miles from the Antony Coper Mine, or known as the Midnight Mine, and contains 40 acres in all; as recorded March 4, 1924, in Book 171 of Mining Records, Page 65, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 4:

Commencing at South West Corner on the Center Section line and going 1320 feet North to a post marked North West Corner; thence 1320 feet East to a post marked North East Corner. Thence 1320 feet South to

(Testimony of Kent Blanche)

a post marked South East Corner. Thence 1320 feet to the point of beginning. This claim is situated in the S. E. 1/4 of N. W. 1/4 in Section 28, T. 7, N. R. 3 E. in Belville Mining District of San Bernardino County, in the State of California, and shall be known as the Royal Placer Claim No. 4, and contains forty (40) acres in all; as recorded March 4, 1924, in Book 171 of Mining Records, Page 66, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 5:

Commencing at the South West Center of the South West 1/4 of Section 28 and going 1320 feet North to a post marked North West Corner. Thence 1320 feet Easterly to a post marked The Center of Section 28. Thence 1320 feet South to a post marked South East Corner. Thence 1320 feet to the point of beginning. This claim is situated in the N. E. 1/4 of S. W. 1/4 of Section 28, in T. 7 N. R. 3 E and contains 40 acres, and shall be known as The Royal Placer Claim No. 5, and its location is in the Belville Mining District of San Bernardino County, State of California, and is marked by the Camp Rock Cook House and also the mill; as recorded March 4, 1924, in Book 171 of Mining Records, Page 67 of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 6:

Commencing at South End Center Meridian line and going 1320 feet West to a post marked South West Corner. Thence 1320 feet North to a post marked North West Corner. Thence 1320 feet Easterly to a post

(Testimony of Kent Blanche)

marked North East Corner. Thence 1320 feet to the point of beginning. This claim is situated in S. E. 1/4 of S. W. 1/4 of Section 28, T. 7 N. R. 3 E. and contains 40 acres and shall be known as The Royal Placer Claim No. 6, its location is in the Belville Mining District of San Bernardino County, State of California, as recorded March 4, 1924, in Book 171 of Mining Records, page 67, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 7:

Commencing at the South East Corner Section post and going 1320 feet West to a post marked South West Corner. Thence 1320 feet North to a post marked North West Corner. Thence 1320 feet East to a post marked North East Corner. Thence 1320 feet South to the point of beginning. This claim is situated in S. E. 1/4 of S. E. 1/4 of Section 28, in T. 7 N. R. 3 E. and contains 40 acres, and is located in the Belville Mining District of San Bernardino County, State of California, and shall be known as The Royal Placer Claim No. 7; as recorded March 4, 1924, in Book 171 of Mining Records, page 68, Records of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 8:

Commencing at South Center Section Post and going 1320 feet North to a post marked North West Corner. Thence 1320 feet East to a post marked North East Corner. Thence 1320 feet South to a post marked South East Corner. Thence 1320 feet to the point of beginning. This claim is situated in the S. W. 1/4 of S. E. 1/4 of Section 28, in T. 7 N. R. 3 E. and contains 40

(Testimony of Kent Blanche)

acres, and is located in Belville Mining District of San Bernardino County, California, and shall be known as The Royal Placer Claim No. 8; as recorded March 4, 1924, in Book 171 of Mining Records, Page 68 of San Bernardino County, California.

ROYAL PLACER CLAIM NO. 9:

Commencing at the Center of Section 28 and going 1320 feet East to a post marked North East Corner. Thence 1320 feet South to a post marked South East Corner. Thence 1320 feet West to a post marked South West Corner. Thence 1320 feet to the point of beginning. This claim is situated in the N. W. 1/4 of S. E. 1/4 of Section 28, in T. 7 N. R. 3 E. and contains 40 acres, and is located in Belville Mining District of San Bernardino County, State of California, and shall be known as The Royal Placer Claim No. 9; as recorded March 4, 1924, in Book 171 of Mining Records, Page 69, Records of San Bernardino County, California, comprising all told 360 acres of placer claims."

REDIRECT EXAMINATION

Question by Mr. Wright. "Mr. Blanche, on cross examination Mr. Turnbull asked you whether or not there was any suspicion in your mind at the time Mr. Kleinschmidt gave Mr. Baum a 50 per cent interest in the proceeds of the Camp Rock Mine. Will you please tell his Honor what the consideration was for that agreement? * * * That is the agreement that you say is the fraud of November, 1932."

(Testimony of Kent Blanche)

(Whereupon, an objection to the question was made on the ground that it was calling for a conclusion of the witness; invading the province of the court, to determine that; not calling for facts, but calling for pure legal conclusion.)

(Whereupon, the objection was overruled and an exception taken.)

“THE WITNESS: Well, the consideration for that—I knew that immediately prior to and surrounding the original agreement, which I prepared with Llewellyn and Evans, that Mr. Baum had been instrumental in consummating that sale, and I knew that Mr. Kleinschmidt wouldn’t let that go unrewarded, particularly in view of the fact that I knew also the state of Mr. Kleinschmidt’s finances—that it was just touch-and-go as to whether or not he could keep it, and a sale would have to be made or the contract would have been defaulted. I knew all of those things, so there was no suspicion raised in my mind in November.

MR. TURNBULL: Now, I move to strike the answer upon the ground it calls for a conclusion of law, and not a statement of facts; invading the province of the court.

THE COURT: That may be stricken. Remember, the question is as to the consideration and your knowledge of what you actually know of the consideration.

MR. TURNBULL: If your Honor please, I move to strike the answer commencing with the words ‘I knew that Mr. Kleinschmidt wouldn’t let it go unrewarded, and I knew all this’—as being a conclusion of the witness, invading the province of the court and as calling for a

(Testimony of Kent Blanche)

conclusion of the witness. It was not a recital of facts, but a recital of a state of mind of another person.

THE COURT: I will deny the motion."

Mr. Baum definitely worked out there on the mine. He went out and ascertained that development work was done. Subsequent to that assignment he assisted very materially in the trial of the case of Kleinschmidt v. Grubl. In that case he procured a surveyor and assisted very materially in a very difficult survey, and assisted me materially throughout the case with trips to the property when required and discussions with witnesses and procuring witnesses and various things which were more or less a part of his assistance rendered. He was instrumental in arranging for the sale of the mine between Mr. Llewellyn and Mr. Kleinschmidt. Those parties came to me at Mr. Baum's direction for the final consummation of the contract. He acted as Mr. Kleinschmidt's agent through the Llewellyn and Evans transaction and prior to that. He had other tentative sales he was endeavoring to make on behalf of Mr. Kleinschmidt. I knew of Mr. Kleinschmidt's financial condition in the spring of 1932. His financial condition was such at that time he had to borrow money on two occasions to make the thousand-dollar payments. The thousand-dollar payments were the payments due under the agreement between Messrs. Stock and Pohl and Sullivan. That agreement is defendants' Exhibit A. Mr. Kleinschmidt sent me checks from October until the full purchase price had been paid. That was from October of 1931 for a period of approximately 15 additional months. He turned over to me fifteen or sixteen thousand—a sum in excess of that. There were

(Testimony of Kent Blanche)

some liens that he subsequently paid and some other expenses. He paid me about \$15,800. The total purchase price of the mine was \$21,800. When I include the \$15,800, there was an \$800 lien on the property in favor of the Hayward Lumber Company which was also paid and settled for that amount. I am quite sure that I received that amount of money from him. During October and November, 1931, I received some \$333 from Sullivan but the balance I received from Mr. Kleinschmidt. Mr. Sullivan made his last payment in November of 1931, I believe. I am not absolutely positive about that. I didn't presume that Mr. Sullivan's interest would be important here, and I didn't check up on that, but I believe that it was at that time. The sheet I had in my hand this morning was wholly written in my handwriting and was prepared by me. I think the document is incorrect in stating that Sullivan's last payment was in October. I believe he made his last payment in November. I have a distinct recollection that he paid for two months in November of 1931.

"Q [BY MR. WRIGHT] Yes. And your testimony was this morning, as I recall it, that Mr. Baum's last payment was in August of 1931. Is that right?

MR. TURNBULL: September, counsel.

THE COURT: September.

Q BY MR. WRIGHT: I beg your pardon. September. You testified to that this morning, did you not?

A No, I didn't. I testified that—

THE COURT: Well, there is no use going over that again. This witness has testified it was in September, according to his recollection. Now, do not take up time in going over those matters again."

(Testimony of Kent Blanche)

RECROSS-EXAMINATION

With reference to my having testified that Mr. Baum made a payment, in my testimony this morning, I believe it was that I didn't know that he had made a payment. If he defaulted in September, he didn't make a payment in September. I didn't want to testify that he had. I don't believe that he had. I made a quitclaim deed from Baum to Kleinschmidt on February 29, 1932, because Mr. Kleinschmidt had procured to be assigned in September, 1931,—procured to be assigned a re-assignment of 26-2/3 interest in the property, and the original assignments had provided for a third. I felt that Mr. Kleinschmidt's preparation of this assignment was ambiguous and I advised him that it would not clear the title properly and I suggested that Mr. Kleinschmidt make a quitclaim. I wasn't familiar with the adjudication in bankruptcy in 1931 at that time. I do not recall having any particular knowledge of any adjudication in bankruptcy, but only that I felt that it was merely for the purpose of clarifying a situation which had already crystallized it. I thought Mr. Baum had no further right in the property at that time, having defaulted. Under the terms in that contract his right to the property ceased, and his putting a quitclaim deed on file did not affect anything but the record title, and it was a clarification of something which actually had already taken place. Mr. Baum was a married man. I did not have his wife join in the deed because she wasn't on the original deed. This was merely for the purpose of clarification of the record. Frankly, I don't know why I didn't have her sign it. Perhaps it was an oversight. I think it definitely was. I don't believe I would have had this deed executed if I had known or had in mind that

(Testimony of Kent Blanche)

there had been an adjudication in bankruptcy. Of course it is my state of mind back six years. Having had a lot of these things thrown at me since, it has sort of confused me as to what my then knowledge was. The case involving the validity of the location, and so forth, was tried three days in April and seven days in August, 1935. At the time the original agreement was made in April of 1931, I did not represent any of these people, Mr. Baum, Mr. Kleinschmidt or Mr. Sullivan. I first was connected with the enterprise when I prepared a sort of working agreement concerning the purchase—that is, concerning their contributions to the mine after they had purchased it. I believe it was around April 24, 1931. That was the first thing I had done. I came to prepare it at the request of Mr. Kleinschmidt. He presented me with a rough draft of a sort of a general agreement between these three parties, each to pay a third of the purchase price, but participate in $26\frac{2}{3}$ of the profits. The additional 20 per cent went to a man by the name of Murray and seven assigns. That was equally split among eight people— $2\frac{1}{2}$ per cent each. That was in the nature of a commission for the purchase of the mine. My office is in Los Angeles. I saw Baum intermittently, maybe a space of a week or a month, depending on whether or not I had anything to do with him. I knew where this property was located. It was located about 30 miles from Daggett, in San Bernardino County. I considered Mr. Kleinschmidt was my client of the three and I billed him. I represented all of them in making the payments. I knew what Mr. Baum was doing up to the time of his adjudication in bankruptcy in November of 1931. He was a builder in Los Angeles. He was not out on the property. None of

(Testimony of Kent Blanche)

these three persons resided on the property. None of these three persons worked there more than a day or two. The sale was made to the Llewellyn people in April of 1932. There were two watchmen working the property from the summer of 1931 until April, 1932. These watchmen were dry-washing. They were operating the property in a very small way. I saw Mr. Baum from September of 1931 until November, 1932, half a dozen times. I don't believe more than that. I don't recall. I don't recall of any particular instance at the present time which necessitated my seeing him except possibly for the purpose of procuring the execution of the documents, which he did execute. I had no particular occasion that I recall ever to get in touch with him, except that I did discuss with him, I think, more often on the phone concerning that deal with Evans and Llewellyn. I prepared plaintiff's Exhibit 20, which is the Llewellyn sale contract. Mr. Baum acted as agent in this sale and in procuring the purchasers. He got something in the way of a commission in November. He didn't at that time. I knew he assisted in arranging the sale because Llewellyn and Evans told me that they had been to his office and discussed it with him. He told me they were coming over. He had the terms of the sale pretty well crystallized. At that time Mr. Kleinschmidt was in San Francisco. I told him on the telephone and these men discussed further and more complete terms in my office concerning that deal. I verified those terms with Mr. Kleinschmidt and they theoretically shook hands on the deal over the telephone, leaving it for me to prepare the final papers. Mr. Kleinschmidt at that time was Treasurer of The Pacific Telephone and Telegraph Company in San Francisco. He

(Testimony of Kent Blanche)

was located in San Francisco. He was a resident of this district until he moved in the summer of 1931. He was transferred from General Auditor of the Southern California Telephone Company to Treasurer of The Pacific Telephone and Telegraph Company. That necessitated the transfer. He lived in Palo Alto and his office was in San Francisco. I don't recall if I saw him over once or twice between that time and May, 1932. Maybe I didn't see him at all. I had various discussions with him over the telephone. Mr. Sullivan, during the time when Mr. Kleinschmidt moved to San Francisco until May of 1932, was hard to keep track of. He was operating the Sullivan Beauty College in the Arcade Building or across the street from the Arcade Building in Los Angeles. He was also connected during some portion of that time with a Mr. Sixbey in a mine up north, and subsequently went over to San Francisco. The last I heard about him prior to his death was that he was a barber in San Francisco. He was a man of considerable talent. He was a prize fighter and a beauty specialist. I have no distinct recollection of ever having seen Mr. Baum during that particular time, but I think I must have seen him, because—I was more familiar with him in 1932 than I had been in April, 1931. I must have seen him at some time during that period of time, but I don't recall any specific instance. There is an assignment by Baum in September, but I didn't procure that. There is a quitclaim deed in February, which I did procure. I believe I saw him at that time. The assignment by Baum, which is Exhibit 11, is dated September 23, 1931, I believe. (The exhibit was subsequently identified as defendants' Exhibit B.) I don't recall having prepared it. I don't distinctly recall know-

(Testimony of Kent Blanche)

ing about it at the time it was executed. I know in subsequently looking it over, I felt it was insufficient, but I don't recall whether I saw it shortly after the time it was prepared or not. I felt it was insufficient. I felt a quitclaim deed would have cleared the title much more thoroughly. I suggested the preparation of a quitclaim deed. Mr. Kleinschmidt suggested that it would be a good idea and during the course of several months I procured it. I don't have any distinct recollection as to when I first saw defendants' Exhibit B. I don't recall that I knew the assignment was contemplated before it was executed. I was representing Mr. Kleinschmidt at that time. The reason that some of those things are rather hazy in my mind is that while I was retained by and acting more specifically for Mr. Kleinschmidt, I more or less considered these three men as an entity. They knew each other better than I knew any of them, and their personal dealings among themselves were just as putting them down more or less as a clerk, as I did in that agreement. It was something that I didn't pay very much attention to. Prior to February, 1932, in looking over that assignment, I felt that that was insufficient. I don't recall any instructions to me by Mr. Kleinschmidt or any previous knowledge of the contemplated execution of Exhibit B. It is my recollection that Mr. Kleinschmidt told me at or about that time that Mr. Baum was not going to make any payments or had told him that he couldn't come through any more, and that Mr. Baum had told me that he had to drop out, and it is my recollection that there was a conversation between Mr. Kleinschmidt and me concerning something in the nature of clarifying that; but whether or not that was before or about the time of that assignment—if I am

(Testimony of Kent Blanche)

not mistaken it was about the time that was procured by Mr. Kleinschmidt himself but not by me.

RECROSS-EXAMINATION

One of the deals that Mr. Baum was instrumental in bringing to my office is one by which Mr. Kleinschmidt purported to sell this Camp Rock property to Frank Llewellyn and Jerome Evans in April, 1932. That purports to be a sale of the same property instead of to Llewellyn, to Llewellyn and Evans. I drew that contract. I drew both of them. I drew one by which the sale was made to Llewellyn instead of to Llewellyn and Evans. On the occasion of drawing the one from Evans to Llewellyn, I did not talk to Baum. I did not talk with reference to this one on the 8th of April. I don't think Baum knew about the other one. Baum was the man who got these purchasers. The subsequent agreement drawn a month later was after Evans had dropped out. I think Baum called me on the telephone concerning the sale at or about the time I drew this agreement on the 8th day of April, 1932. Baum did not come back and tell me that Evans dropped out and that he had to have a new agreement with Kleinschmidt and Llewellyn alone. Llewellyn told me that. I don't recall if Baum made the new deal by which Llewellyn and Kleinschmidt made the new deal. The situation was that Evans and Llewellyn got into a fight and Llewellyn came in and said he couldn't proceed with Evans in the deal and that if Evans was going to have a 50 per cent, he just couldn't do it. He said "I am going to default and I want you to treat us as gentlemen." I said "If you make the default and you then want to enter into a new agreement, I don't see how

(Testimony of Kent Blanche)

we can prevent it." I discussed that with Mr. Kleinschmidt. So a new deal was entered into with Mr. Llewellyn alone and crediting him on the \$50,000 purchase with \$1,000, which he had previously paid when it was in partnership with Mr. Evans. That is why this second agreement. Mr. Baum didn't have anything to do with it. That is why the first agreement was for \$50,000 and the second agreement \$49,000. Mr. Baum had nothing to do with the second agreement. The reward for the second agreement was that he was to get a 50 per cent interest because it was practically the same deal, leaving out Evans. I didn't know at the time that he was to get a 50 per cent interest. I didn't know that he was to get any interest.

(Whereupon, there was offered and received into evidence plaintiff's Exhibit 24, which is an agreement from Kleinschmidt to Llewellyn and Evans, dated April 18, 1932.)

"AGREEMENT FOR SALE OF MINING PROPERTY

THIS AGREEMENT, made and entered into by and between WALTER G. KLEINSCHMIDT of the City of San Francisco, State of California, hereinafter called Vendor, and JEROME H. EVANS and FRANK LLEWELLYN, of the City of Los Angeles, hereinafter called Vendees,

WITNESSETH: That in consideration of the covenants of the parties hereto hereinafter contained, the said Vendor agrees to sell and convey to the Vendees, and

(Testimony of Kent Blanche)

Vendees agree to purchase those certain mining properties located in the County of San Bernardino, State of California, and more particularly described as follows, to-wit:

Royal Placer Claim Number 1, as per description recorded in Book 171, page 63, Mining Records.

Royal Placer Claim Number 2, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 3, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 4, as per description recorded in Book 171, Page 65, Mining Records.

Royal Placer Claim Number 5, as per description recorded in Book 171, Page 66, Mining Records.

Royal Placer Claim Number 6, as per description recorded in Book 171, page 67 Mining Records.

Royal Placer Claim Number 7, as per description recorded in Book 171, page 68, Mining Records.

Royal Placer Claim Number 8, as per description recorded in Book 171, Page 68, Mining Records.

Royal Placer Claim Number 9, as per description recorded in Book 171, Page 69, Mining Records.

Gold Junction Quartz, as per description recorded in Book 168, Page 189 Mining Records.

Gold Bar No. 1, as per description recorded in Book 168, Page 183, Mining Records.

Gold Bar No. 2, as per description recorded in Book 168, Page 183, Mining Records.

The purchase price to be paid for said property shall be in the amount of Fifty Thousand Dollars (\$50,000.00) in lawful money of the United States, to be paid by the

(Testimony of Kent Blanche)

Vendees to the said Vendor upon the terms as hereinafter stated, to-wit:

One Thousand Dollars (\$1000.00) upon the execution of this agreement.

One Thousand Dollars (\$1,000.00) on May 1st, 1932,

Two Thousand Dollars (\$2,000.00) on June 1st, 1932,

Four Thousand Dollars (\$4,000.00) on July 1st, 1932, and in installments thereafter at the rate of fifteen per cent (15%) of the gross mineral products produced from said property with a minimum guarantee of One Thousand Dollars (\$1000.00) per month until the full purchase price has been paid.

It is particularly understood and agreed that the terms hereof shall be without grace save and except as regards the payment of May 1st, 1932, with reference to which payment the said Vendees shall have a period of eight (8) days grace. All payments thereafter shall be made on the first day of each and every calendar month.

It is particularly understood and agreed that in the event said Vendees desire to complete the payment of the purchase price of said mining property at any time before the payment thereof becomes due under the terms hereinbefore set forth, that the same may be done, in which event said vendees will be allowed a deduction of six per cent (6%) from the then remaining unpaid purchase price.

It is particularly understood and agreed that all title charges will be paid by the Vendees but may thereafter be deducted from the payment falling due under the terms of this agreement out of June 1st, 1932.

(Testimony of Kent Blanche)

It is further understood and agreed that any failure to pay any installment of the purchase price shall constitute an immediate forfeiture on the part of said Vendees, and the said Vendor shall be released from all obligations both at law and in equity, to convey said property, and in such event the Vendees shall forfeit all right to said property and all payments theretofore made by said Vendees shall be forfeited to the said Vendor, and in the event of such forfeiture, said Vendees shall be relieved from all further payments on account of said purchase price.

It is understood and agreed that an accounting of all mineral products shall be continuously and permanently maintained to show in intelligent detail all revenue derived from the operation of said property hereinbefore described, and all Treasury receipts and vouchers shall be permanently retained by the said Vendees. The Vendor will at any time upon request, be furnished with a complete and full accounting of all revenue derived from the said property, and said Vendor may furthermore verify said accounting with the accounts of said Vendees.

It is further understood and agreed that said Vendees may deposit any and all payments on account of the purchase price with depository in Los Angeles, California, said depository to be designated by the said Vendor.

The said Vendor agrees to convey by proper deeds a good and sufficient marketable title to said property free and clear of any incumbrances whatsoever.

(Testimony of Kent Blanche)

It is particularly understood and agreed that the said Vendor does not warrant or guarantee title as to any of the personal property now located on the property hereinbefore described, but does hereby sell and convey all of his right, title and interest in and to said property, and further agrees to hold the said Vendees free and harmless from any litigation or from the costs thereof, which may arise out of or concerning the title to said personal property, it being fully understood and agreed that should any valid or subsisting claims be advanced against any of said property, that said Vendees may purchase the same or deliver to the real owner thereof at their pleasure.

It is further understood and agreed that said Vendees will pay any and all taxes assessed against said property during the term of this agreement, and will do all necessary assessment work in the time provided by law therefor.

It is further understood and agreed that said Vendor will pay any and all incumbrances now existing against said property within a sufficient time as to not hazard the interests of said Vendees.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 8th day of April, 1932.

Walter G. Kleinschmidt

Vendor

Jerome H. Evans

Frank Llewellyn

Vendees

(Testimony of Kent Blanche)

STATE OF CALIFORNIA)
) ss
 CITY AND COUNTY OF SAN FRANCISCO)

On this 19th day of April in the year One Thousand Nine Hundred and thirty-two before me, W. W. HEALEY, a Notary Public in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared WALTER G. KLEINSCHMIDT, known to me to be the person described in and whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in said City and County of San Francisco, the day and year in this Certificate first above written.

(NOTARIAL SEAL)

W. W. Healey

Notary Public, in and for the said City and County of San Francisco, State of California. 208 Crocker Building

My Commission expires August 29, 1933.

No. 72 'Endorsed' recorded at Request of Frank Llewellyn Apr 23, 1932 at 11:05 A. M. in Book 796, Page 327 Official Records, San Bernardino County, Calif., Fulton G. Feraud, County Recorder, By A. R. Schultz, Deputy. Fee \$2.00.

Compared
 HP

M. Lawrence K. Keller

I, TED R. CARPENTER, County Recorder in and for the County of San Bernardino, State of California, do hereby certify that the foregoing is a full, true and correct copy of the AGREEMENT FOR SALE OF MINING PROPERTY recorded in book 796 of Official Records page 327 of San Bernardino County Records.

TED R. CARPENTER, County Recorder.

By C C Boyd Deputy Recorder."

In addition to bringing these parties together, I previously testified that Mr. Baum did work out there on the mine.

“THE COURT: I somewhat touched the same subject, and my understanding was that the witness said Baum was a contractor here in town, and I understood that he had not been working on the mine.

THE WITNESS: That is right; wasn't working on the mine."

As a lawyer I deemed it necessary that the record title there had to be in better shape than it was in order for that property to be salable. I had an abstract of title. In that abstract of title the agreement of April, 1931, showed up.

(Testimony of Benjamin Franklin Baum)

BENJAMIN FRANKLIN BAUM,

called as a witness on his own behalf, being first duly sworn, testified as follows:

I am one of the defendants in this action and reside at 1565 North Columbus, Glendale, California. At the present time I am employed by the government as a resident engineer inspector. In April, 1931, I was in the contracting business in Los Angeles, with my brother as a copartnership under the name of H. W. Baum & Company. I and Mr. Sullivan and Mr. Kleinschmidt entered into a contract to purchase the Camp Rock Placer Mine from Mr. Stock and Mr. Pohl. That agreement provided for the payment of \$1,000 a month by us three gentlemen to Mr. Stock and Mr. Pohl. I was under the impression that I defaulted in July. I am not positive, but it might have been in August. When I say defaulted, I mean that the last payment I made was either in July or August, 1931. I didn't have any money to make further payments with. I could not continue on with my part of the agreement. I told Mr. Kleinschmidt that. I do not know whether I made my last payment in July or August. In August I sent a waiver up to Mr. Kleinschmidt in San Francisco and he sent it back. He said it wasn't in the form he wanted it, and that he would be down and he would make up the agreement as he wanted it made, which he did. Mr. Kleinschmidt asked me to give him an assignment of my interest and that was subsequent to the time that I defaulted under the agreement. Defendants' Exhibit B is the assignment I executed at Mr. Kleinschmidt's request. Mr. Kleinschmidt prepared it, or at least he brought it to me. I don't know who

(Testimony of Benjamin Franklin Baum)

wrote it. I didn't write it myself and my lawyer did not do it for me. I filed my voluntary petition in bankruptcy in this court on November 6, 1931. My attorney at the time was Mr. Parke of Bixler & Parke.

(Whereupon, it was stipulated that Mr. Parke had retired from practice because of a nervous and mental breakdown and cannot be consulted on any subject. It was further stipulated that he could not be produced at the trial.)

I had several conferences with Mr. Parke regarding the filing of my petition in bankruptcy. He went over all of our affairs with my brother and me. My brother also filed a petition in bankruptcy at that time. I mentioned to Mr. Parke this Camp Rock Placer Mine. I told Mr. Parke I had defaulted in my payments on this mine and that I had some kind of an interest which might at some time be worth something. I didn't know, but I considered it worth nothing. In fact the agreement that I wrote—that I sent up to Mr. Kleinschmidt—wasn't that kind. I waived all my rights because I didn't consider it was any good. I explained this to Mr. Parke and he said "I don't think it is any good," and it was never put on there. By that I mean it was never declared among our assets. The interest to which I am referring is the provision in the agreement of April 24, 1931, plaintiff's Exhibit 18 in evidence, which provides as follows:

"In the event that any of the said parties fail or refuse to supply his proportion of the required funds, when and as said funds are required as herein set forth, time being the essence of this requirement, then, and in that event, the other parties hereto shall have the right to pay such

(Testimony of Benjamin Franklin Baum)

sums as are required, and in that event, any and all interests owned by said defaulting party in and to said agreement for sale of mining property, or in or to said property, shall be deemed forfeited; provided, however, that any and all moneys paid under and by virtue of said agreement shall be repaid to said defaulting party at the rate of five per cent of any and all profits produced by said property, after said property has been fully paid for, and good and sufficient deed conveying said property shall have been executed and delivered to the other two parties; or in the event of sale of said Camp Rock Placer Mine, said defaulting party shall be paid at the rate of twenty-six and two-thirds per cent of the payment made under said sale until he has received an amount of money equal to the amount of money which he has supplied with this agreement."

I put up money for five months under the contract at the rate of \$333.33 each month. I made five payments. At the time I went into bankruptcy I had no agreement for the sale of this Camp Rock mining property and Mr. Kleinschmidt had no agreement for the sale of it, and I considered at this time that this right was of no value or of no consequence in November of 1931. I did not consider that it was of any value then for it seemed we would have been very lucky if we could have sold that and it didn't look like the payments could have been kept up; if they weren't kept up the property was lost. We couldn't find anybody who would make a payment down on the thing. There were a lot of people who wanted to take the thing on a royalty basis, but that didn't make the payments and there wasn't enough money in Mr. Klein-

(Testimony of Benjamin Franklin Baum)

schmidt's hands to keep it going, I wouldn't think. I knew that when Mr. Kleinschmidt started, he did not have enough money to keep up the making of payments. When I say when he started, I am referring to when the deal was talked over at first, in April, 1931. Referring to a month or two prior to January and February, 1932, I had some parties interested in buying and it looked like we might make a sale. They didn't want to put much money down, but it was really about the best thing that was offered at the time. That deal went along until December and of course Kleinschmidt was getting in worse shape financially all the time, having to put up this money and he said we would have to sell it.

“THE COURT: Who said ‘we would have to sell it’?”

THE WITNESS: Kleinschmidt said he would have to sell it.

THE COURT: Oh, yes.”

I can't remember exactly, but I think about that time, after a meeting with the people, I was trying to sell it for Kleinschmidt in December, they couldn't put up any money, kept putting me off all the time. So I thought, “Kleinschmidt, I don't think I can sell it to those people.” Then Evans dropped in on me and we talked over the deal. I said, “Well, I think that Kleinschmidt will take \$50,000.00 for this. He won't allow you to put in the quartz. He won't sell the quartz.” So he came back again and in the meantime I talked to Kleinschmidt on the phone, and he said, “Well, I think I am willing to put in the quartz claim.” I said, “Well, I think I can make a deal with this fellow, if you put the quartz claim in,” which he did. I said, “Well, I think the deal is satisfactory to

(Testimony of Benjamin Franklin Baum)

Kleinschmidt.” He got in touch with Kleinschmidt, and Kleinschmidt sent him over to Blanche to draw up the papers. Except for what I have just told you, I handled all the negotiations for the sale of this mine. I think they talked to Kleinschmidt on the phone once to get a verification of what I had told them. About this time I made one or two trips up to the mine and we had some trouble with the watchmen up there. He told me that he would like for me to keep in touch with the mine, but after he was transferred to San Francisco he wanted me to look after his interests, and I did do that. Whenever there was anything to be done that I could do, I did it. He never paid me anything. I never got paid for it. I said at that time I thought \$5,000 was right. That was between November and December, 1931. Kleinschmidt said, “If you get a cash price I can give you \$5,000 for it.” Well, we couldn’t even raise a thousand dollars, so we couldn’t even make a deal with them. Then when we got hold of Evans and Llewellyn, I asked him the same price on that deal, and we thought we were going to get about \$25,000 down from those people, but it landed up only a thousand dollars a month. And he said, “I can’t pay you a dime.” He said, “I’ll have to make some other arrangements,” and that is the way it was left until he finally made the agreement, which was recorded in November. That agreement is the agreement of November 15, 1932. That is plaintiff’s Exhibit 12 in evidence. I never had any oral or written agreement with Walter Kleinschmidt that Walter Kleinschmidt would reconvey anything to me after my discharge in bankruptcy. I never discussed with him at any time that I was going to give him the deed that is here in evidence for the purpose of defrauding my credi-

(Testimony of Benjamin Franklin Baum)

tors. I gave them all I had. I gave that deed in full faith and I didn't want anything more to do with it. Mr. Kleinschmidt did not tell me at any time that he would reconvey this property or anything in it to me. I did not discuss my bankruptcy question with Mr. Kleinschmidt, and he didn't know anything about it any more than I did. The bankruptcy happened to be a shot out of a cannon with us.

CROSS-EXAMINATION

Mr. Kleinschmidt came down here from San Francisco and said to me, "I wish you would act as my agent in the sale of the Camp Rock property." I was looking after his affairs from July on. This occurred before November. It was in September that he was down here. I don't remember him being down in November. I don't think that he was down here within a month after my bankruptcy. I was up there. Wherever it was, he told me to sell the Camp Rock property. I proceeded within a month of my bankruptcy to get purchasers. I had purchasers before. I continued to try to get a purchaser. The Evans and Llewellyn contract was not the first contract I got signed up. I got one signed up in July with Jackman and McClure. I just showed you another I got signed up here in August with D'Elia. I didn't say that I was out of the business by June. I testified I made five months' payments. I have seen a contract purporting to be between Benjamin F. Baum and Walter Kleinschmidt and Sullivan, as sellers, with Louis D'Elia. I couldn't tell you whether that was made on or about the date it bears, the 18th of August. I didn't pay in September so I still had an interest on August 18, 1931, the date of the exhibit for

(Testimony of Benjamin Franklin Baum)

identification. I know I defaulted in September. I wouldn't tell you whether I got the Evans and Llewellyn deal on April 8th. That is the deal that went through in the modified form, when Evans went out and Llewellyn went through with the deal. The deal was made with Evans and Llewellyn but I wouldn't take the responsibility of keeping those people together. The fact that Evans dropped out and Llewellyn came back, why, the sale was all I was interested in. I wasn't trying to keep them together. At the time I made the deal and thereafter, at any time in 1932, I did not have a real estate broker's license. I couldn't and never collected a real estate commission for making that sale. My bankruptcy schedules were sworn to on November 5th and they are in evidence **here**. At that time I didn't give a damn for any interest I had in the Camp Rock property and that is what I thought at the time. Five months and four days later, I sold the property for \$50,000 but I didn't get any money. Eventually \$49,000 was collected by Kleinschmidt. Suddenly the property got good. The 1st of April it was worth a thousand dollars—just what they put in there—because if they hadn't put in that thousand dollars they would have lost it so it was worth a thousand dollars. The 1st of May it was worth two thousand dollars, not \$50,000. It was worth \$50,000 when it was paid for. In other words, the \$49,000—the price that was paid does not really represent the full value of the mine unless you could keep the payments up.

I knew that I owed \$93,000 some time in advance of November 5th. We owed the bank \$20,000. Our rating was about No. 2 here, I think, according to Bradstreet & Dun's, and anybody who can do as much business on \$20,-

(Testimony of Benjamin Franklin Baum)

000 borrowed money is in pretty good shape. I don't remember of owing any \$93,000 for several months before November 5th. I don't know how the books are worked out.

I said I made two trips to the mine. When I went to the mine we had some trouble with the watchman up there which I straightened out. I did not do any physical labor on the mine, any sinking of the shafts. I had some **assessment** work done by the watchman but I didn't do any of it. I made more than two trips to the mine, but I made two trips. In addition to that I brought the parties together on the sale. After my bankruptcy we had a lawsuit in connection with the mine that lasted a year. That lawsuit was filed in 1935 and I had this interest back in November of 1932.

Mr. Sullivan had the contract with the locaters of the mine. Under this agreement (the Stock and Pohl agreement) in the event of the failure of any of the parties to keep up this payment totaling a thousand dollars a month, his interest was to be deemed forfeited. Under this agreement, at the time of my default in August or possibly July of 1931—if the others had carried on the agreement, and had made a profit, I would have been entitled to have something back. What I had in mind when I said that I had some sort of interest that might be worth something but that I did not think it was worth anything at that time was this. There wasn't enough money in the crowd to keep the payments up in the first place. We knew that it had to be sold. The probability of selling it wasn't very bright, and it had to be sold in order for anybody to get any of their money back, and it had to be paid for also,

(Testimony of Benjamin Franklin Baum)

so that it looked like there wasn't any chance at all of that thing working out to anybody's advantage unless you could find somebody with money enough to buy it, which is a chance that really materialized. That is what did happen.

I didn't show this agreement (plaintiff's Exhibit No. 18) to Mr. Parke. He never saw it. I told about it. Of course, unfortunately, Mr. Parke wasn't in very good health. The date of the assignment of my interest to Kleinschmidt is the 23rd of September. On that day I was in Los Angeles. I wasn't doing anything at that time; trying to get myself together. I just lost all my money. After the 23rd of September with reference to this claim—I think it was around November that I found the next person who wanted to buy it. I thought I could sell it to Mr. Messenger. I worked on him for about two months. Pending that time, from September to November, I was willing to talk mining with any prospector in the way of a purchaser, if I thought I could sell it. In other words, I was trying to sell the mine. That was about the only thing that I could find to do.

I have received some of this \$49,000. I don't want to be held to this because I don't know exactly, but I think I received around \$7,000. I received that \$7,000 when it came in, as it was paid. There wasn't any disbursement made until after the mine was paid off, and I think the first payment that I received—I don't know just how much it was now; I imagine Mr. Kleinschmidt has the records. I have got some of it. I mean when I say "the mine was paid off" it was paid off in November. Kleinschmidt finished paying for it in November. You see Kleinschmidt

(Testimony of Benjamin Franklin Baum)

was getting the money from Llewellyn and Evans for it. Kleinschmidt had finished paying for it according to my recollection in 1932, and from that time on I began to receive some money. I think it was in November. I am not sure. There is an assignment to Mr. Baum dated November 15, 1932. That is about when I received the payment in November. There wasn't much discussion about the contract that was made in November, 1932—the assignment. What I really wanted was money but Kleinschmidt couldn't give it to me. Because I was only getting a thousand dollars a month from these people, and he had to apply it on the payment. So he said he would make some satisfactory arrangement with me. So I think I saw him about September—August or September of 1933, and that was when he said, "Well, I am going to make some kind of an agreement." I said, "Well, what kind of an agreement is it? Do I get any money out of it?" He said, "Well, I think it will be satisfactory." There never was any question about how much it would be at all, or anything about it. I never knew how much I was going to get until I got the agreement. I didn't say that some time before that—this time in September, I had asked him for money. In making these deals I asked for \$5,000. That is the only time I ever asked for anything. I didn't ask Kleinschmidt for money several times before the November agreement was made. What I meant to say maybe I quoted myself wrong—but in getting these prospects, and my work instrumental with selling this mine, I said I would prefer to have a cash settlement than any other kind, and I said \$5,000 would be satisfactory, and I naturally thought that would be the same with the Llewellyn deal, and I guess I would have received the \$5,000 if it had been a cash deal, but it

(Testimony of Benjamin Franklin Baum)

wasn't. Instead of that we found out they could only pay a thousand dollars a month.

“THE COURT: When you say ‘a cash settlement,’ settlement of what?

THE WITNESS: \$5,000 for making the deal.

THE COURT: Oh! And he agreed to give you \$5,000 for making the deal?

THE WITNESS: Oh, yes. I offered several fellows that if they could sell it, and I would have been glad to give it to them, too.

THE COURT: And, in September he told you he was willing to—do I correctly understand you?

THE WITNESS: He said he would make an agreement that would be satisfactory to me.

THE COURT: In September?

THE WITNESS: Yes.

THE COURT: He said that in September. In the meantime he had not given you any money still?

THE WITNESS: Oh, no; no.

THE COURT: Did you ask him what that agreement was, how much that would be?

THE WITNESS: No. I didn't discuss that with him at all.

THE COURT: All right. What was next said after that?

THE WITNESS: After what?

THE COURT: After he had told you that in September?

THE WITNESS: He brought the agreement down here to Los Angeles.

THE COURT: Do you mean this Exhibit 12?

THE WITNESS: Yes, sir.

(Testimony of Benjamin Franklin Baum)

THE COURT: Yes.

THE WITNESS: And he says—

THE COURT: Was it in its present form?

THE WITNESS: Yes; present form. He said, 'Here's this agreement that I have made up. I hope it is satisfactory.' I said, 'Well, it is a little more than satisfactory. However, I would rather have the cash than the agreement.' And I think—

THE COURT: Let me see that Exhibit 12 again.

(Exhibit passed to the court.)

THE COURT: This, of course, is not the original; only a certified copy. Your understanding was, was it not, that you were to have half of that \$39,200?

THE WITNESS: No. My understanding was that I was to have a half of his interest.

THE COURT: Half of the interest of Kleinschmidt?

THE WITNESS: Of Walter.

THE COURT: How much was that interest?

THE WITNESS: Well, there was 20 per cent to come out of it. That leaves 80 per cent. That would be 40 per cent of it.

THE COURT: Yes; something like \$15,000 and something; 40 per cent of the \$39,000. 40 per cent of \$40,000 would be \$16,000.

THE WITNESS: Whatever the profits were. You see, there was a lot of expenses. We had lawsuits all the time, pretty nearly ever since we have had it. I don't know what that has run to. So, I don't know what the profits were.

THE COURT: When did the payments that Mr. Kleinschmidt made to you cease?

THE WITNESS: Well, when they ceased?

(Testimony of Benjamin Franklin Baum)

THE COURT: Yes, when did they cease?

THE WITNESS: When Mr. Turnbull put an attachment on.

THE COURT: I see. Do you recall when that was?

THE WITNESS: No; I don't. I guess it was around February or March of last year."

It is possible I had a certain interest in that contract even after my default. Provided the mine was paid out and all the payments were made, why, I would get that back, when, as and if; that is, that portion of the \$16,000. The way I figured it out was that in September I made the assignment to Kleinschmidt and waived. Then, of course, in November I thought I did not have any interest in the contract as I had assigned my entire interest.

I gave the testimony before the Referee in Bankruptcy on February 13, 1936, mentioned on page 23.

"MR. TURNBULL: 'Q—When you were going through bankruptcy Kleinschmidt didn't know anything about it?

'A—Oh, yes.

'Q—At the time he dealt with you the second time, did you tell him you were through bankruptcy then, when you acquired that interest?

'A—I told him I had been discharged.

'Q—You told him at that time you were free to do business?

'A—Yes. They told me I was free to do business after I filed the bankruptcy.'"

If you have those questions there, I imagine I gave those answers. I haven't any copy of what I said. Mr. Schroeter was the one who told me that I was free to do business. He is the Referee in Bankruptcy, and said that

(Testimony of Benjamin Franklin Baum)

I could start out doing business after I had filed my bankruptcy papers. To the best of my memory, the following questions were asked me and I gave the following answers:

“Q—You were talking about a time back behind the bankruptcy?

‘A—Yes. I am trying to connect it up. After I got the August payment, I had no further work to do but I did see that the August payment was put through for Kleinschmidt at his request. About that time he asked me to make an assignment to him and I said, ‘All right, shall I send it up to you’ and he said, ‘No, I am going down;’ he said that he would come down in September. That is when the assignment was made. I got into my difficulty almost over night. We had no more idea of them filing than anything in the world. The bank stopped our checks over night although we had \$18,000 in the bank and only owed them \$20,000. So Mr. Kleinschmidt was at this time, in October, I think—it was in October I think Sullivan dropped out. He could not make any more payments. I think that is the right time, maybe a month one way or the other.

‘Q—You are still on the first deal?

‘A—Yes, I am connecting it up. So Kleinschmidt came down here in November and he says ‘Will you look after this thing for me as my agent. I have got to sell this property or I am going to lose it.’ And I said, ‘Well, I don’t know who you are going to sell it to but maybe you can.’

‘Q—This was after the bankruptcy?

‘A—Yes, November, 1932. So I had a little office there. I had a room in the Central Building, and I spent prac-

(Testimony of Benjamin Franklin Baum)

tically all of my time there up to the time I finally ran onto Evans who did buy it. I had one fellow that was going to buy it and I took him to Frisco—anyway, it ran from 1932 to 1933 before—

‘Q—Before you made the Evans deal?

‘A—No. I made it in April, 1932.’ ”

Mr. Sullivan died. Somebody bought his interest, and he got—I don’t know what he paid for it. He did not assign it to Kleinschmidt. Somebody bought his interest. He had about \$3,200 coming, as I remember. Somebody bought it, I think, for about \$2,000; I am not sure. I don’t know the figures on that, and then this fellow was paid \$3,200 by Kleinschmidt. I can’t answer how much I am asserting the balance against the Kleinschmidts now. I think it runs probably around \$3,400. I think \$3,400 is all I have got coming. I am not sure; I can’t be sure of this until—you see, we had some expenses on this trial up here.

RECROSS-EXAMINATION

BY MR. BLANCHE

The payments to me stopped long prior to 1936. They were held up on account of the trial, and I didn’t receive any payments, except \$1,700. That was on account of the Grubl trial. Out of the \$39,000 still due when I became entitled, under this agreement of November 15, 1932, there was a balance to be paid to Mr. Sullivan. A balance of \$3,266—\$3,200 to be paid to Sullivan. There were a great many expenses in connection with various legal items that were had out of the \$39,800. I never became entitled to 50 per cent of that.

(Testimony of Irene Unicum—Frank N. Rush)

IRENE UNICUME,

a witness called on behalf of the defendants, after being first duly sworn, testified substantially as follows:

My name is Mrs. Irene Unicum. I reside at 365 South Cloverdale, Los Angeles. My occupation is secretary to the auditor of Southern California Telephone Company in Los Angeles. I knew Walter Kleinschmidt in his lifetime. I was secretary to the auditor at the time Mr. Kleinschmidt had that position. That was from 1927 to May, 1931. He left Los Angeles in May, 1931. He went to San Francisco. I knew him from 1924, and I was his secretary. His reputation was that he had an excellent reputation in the company.

FRANK N. RUSH,

a witness called on behalf of the defendant, after being first duly sworn, testified substantially as follows:

My name is Frank N. Rush. I reside at 1318 Milan Avenue, South Pasadena. I am vice president and general manager of the Southern California Telephone Company, and have been such since June, 1928. I knew Walter G. Kleinschmidt in his lifetime. I first became associated with him in 1924. My position or occupation at that time was superintendent of traffic for the Southern California Telephone Company in Los Angeles. Mr. Kleinschmidt's occupation at that time was auditor of disbursements. He became auditor of the company in 1927. I will check that to be sure. January, 1937; yes. He was auditor from January, 1927, until 1931, and I became general manager of the company in 1928. So I had an opportunity to observe

(Testimony of Frank N. Rush)

him in my official capacity as general manager as auditor of the company from 1928 to 1931. Mr. Kleinschmidt's reputation in my company and in the community for honesty and integrity was excellent and above reproach.

"MR. WRIGHT: At this time, your Honor, I would like to move that your Honor find in favor of the defendant Margaret D. Kleinschmidt, as administratrix of the estate of Walter G. Kleinschmidt, deceased, on all of the issues in the case; that your Honor grant and find a decree for her with costs upon the ground that the plaintiff has failed to make out and prove the allegations of fraud and conspiracy set forth in the complaint.

I further move that your Honor make and enter a decree in favor of that defendant with costs against the plaintiff, Ernest U. Schroeter, as trustee of the estate of Benjamin F. Baum, a bankrupt.

THE COURT: Well, that is the case, is it not?

MR. TURNBULL: That is the case, your Honor. I would like to be heard.

THE COURT: I am supposed to grant or deny your request.

MR. WRIGHT: I am making that motion for the record, your Honor.

THE COURT: The motion is submitted."

Dated: San Francisco, California, July 17, 1937.

Respectfully submitted,

Pillsbury Madison, Sutro

Attorneys for Margaret D. Kleinschmidt, as Administratrix of the Estate of Walter Granger Kleinschmidt, deceased, Defendant and Appellant.

It appearing to the court that the defendant and appellant Margaret D. Kleinschmidt lodged with the clerk of the above entitled court on May 19, 1937, her proposed statement of evidence under Equity Rule No. 75, and that plaintiff and respondent and defendant and appellant filed herein on July 8, 1937, a stipulation that said proposed statement of evidence above mentioned should be amended as set forth in the stipulation and that this court made its order approving said statement of evidence on July 8, 1937, and this statement being the statement lodged on May 19, 1937, as amended by the stipulation filed on July 8, 1937;

Now, Therefore, this statement is herewith allowed, settled and approved as a full, true and correct statement in narrative and verbatim form of all the testimony produced upon the trial of the above entitled cause.

Dated at Los Angeles, California, this 19th day of July, 1937.

Geo Cosgrave

United States District Judge

[Endorsed]: Filed Jul 19 1937 R. S. Zimmerman,
Clerk By L B Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

SUMMONS

To B. F. Baum and to Kent Blanche, Esq., his attorney:

You and each of you will please take notice that MARGARET D. KLEINSCHMIDT, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, one of the defendants above named, will present her petition for appeal from the decree and judgment in the above entitled cause entered on the 23rd day of February, 1937, to the Honorable George Cosgrave, United States District Judge at Los Angeles, California, on the 19th day of March, 1937, at which time and place you are required to join in said petition for the allowance of said appeal. If you refuse to join in said appeal kindly execute the refusal attached hereto.

Dated: March 19th, 1937.

Pillsbury, Madison & Sutro

Attorneys for defendant, Margaret D. Kleinschmidt, as administratrix, etc.

To whom it may concern:

The undersigned hereby acknowledges that he has received a copy of the above mentioned summons and that he refuses to join with the said Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, one of the defendants above named, in her petition for allowance of appeal from the decree and judgment in the above entitled cause rendered on the 23rd day of February, 1937.

Dated: March 19th, 1937.

B. F. Baum,

By Kent Blanche

His Attorney.

[Endorsed]: Filed Mar 19 1937 R. S. Zimmerman,
Clerk By L B Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION FOR SEVERANCE AFTER REFUSAL
TO JOIN IN APPEAL

Now comes MARGARET D. KLEINSCHMIDT, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, one of the defendants in the above entitled cause, and shows to the court that she has filed herein her assignment of errors and petition for allowance of appeal from the decree and judgment entered in the above entitled cause on the 23rd day of February, 1937; that a request to join in said appeal has been served upon B. F. Baum, who is the only codefendant in said cause against whom said decree and judgment has been rendered, and that he has failed, neglected and refused to join in said appeal.

Wherefore, said defendant herein prays that the court make an order of severance from her said codefendant for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree and judgment entered herein on the 23rd day of February, 1937, and for such other and further relief as may be proper in the premises.

Dated: March 19th, 1937.

Pillsbury Madison & Sutro

Attorneys for defendant, Margaret D. Kleinschmidt,
as administratrix, etc.

[Endorsed]: Filed Mar 19 1937 R. S. Zimmerman,
Clerk. By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER OF SEVERANCE

It appearing to the court that B. F. Baum, a codefendant in the above entitled cause, has been duly notified and requested by MARGARET D. KLEINSCHMIDT, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, to join in her petition for appeal from the decree and judgment of the above entitled court entered on the 23rd day of February, 1937, and that said B. F. Baum and said Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, are the only defendants in said cause against whom said decree and judgment has been rendered, and said B. F. Baum having failed, neglected and refused to join in said appeal, the said Margaret D. Kleinschmidt, as administratrix aforesaid is hereby granted the right to appeal alone from said decree and judgment without joining said B. F. Baum as an appellant.

Dated: March 19th, 1937.

Geo Cosgrave
United States District Judge

[Endorsed]: Filed Mar. 19, 1937. R. S. Zimmerman,
Clerk By L. B. Figg, Deputy Clerk

In the District Court of the United States for the
Southern District of California,
Central Division

ERNEST U. SCHROETER, as
Trustee in Bankruptcy of the Es-
tate of B. F. Baum, Bankrupt,
Plaintiff,
vs.
B. F. BAUM, MARGARET D.
KLEINSCHMIDT, as Admin-
istratrix of the Estate of Walter
Granger Kleinschmidt, Deceased,
MARGARET D. KLEIN-
SCHMIDT, individually, JOHN
DOE, RICHARD ROE, FIRST
COMPANY, a corporation, SEC-
OND COMPANY, a corporation,
Defendants.

PETITION FOR APPEAL

To the Honorable Judges of the District Court of the
United States in and for the Southern District of
California, Central Division:

Petitioner, the above named MARGARET D. KLEIN-SCHMIDT, as administratrix of the estate of Walter Granger Klenschmidt, deceased, considering herself aggrieved by the final order, judgment and decree of the above entitled court, awarding to the above named plaintiff a decree and judgment for the sum of \$10,880 against B. F. Baum and petitioner, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, which said final decree and judgment was made and entered here-

in on the 23rd day of February, 1937, does hereby petition for an appeal from the said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons and upon each and all of the grounds set forth in the assignment of errors filed herewith, and prays that her appeal may be allowed and a citation issued directed to said appellee, Ernest U. Schroeter, as trustee in bankruptcy of the estate of B. F. Baum, a bankrupt, commanding him to appear before the said United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice in the premises, and that a transcript of the record, proceedings and evidence in the above entitled suit duly authenticated may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and for such other, further and different order of relief as to this honorable court may seem just in the premises.

Margaret D. Kleinschmidt as administratrix of the estate of Walter Granger Kleinschmidt, Deceased,
Petitioner.

By Pillsbury, Madison & Sutro

Her Attorneys

The foregoing appeal is hereby allowed upon the filing herein by said petitioner of a cost bond conditioned as required by section 1000 of the Revised Statutes of the United States, with sufficient sureties to be approved by this court in the sum of \$250.00.

Dated at Los Angeles in said district this 19th day of March, 1937.

Geo Cosgrave
United States District Judge

[Endorsed]: Filed Mar 19 1937 R. S. Zimmerman,
Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS

Now comes MARGARET D. KLEINSCHMIDT, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, one of the defendants above named, and assigns the following and each of them as errors on which she will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain decree and judgment of the above entitled court made and entered herein on the 23rd day of February, 1937:

I

The District Court erred in denying this defendant's motion for findings in her favor on each and every issue presented by the pleadings.

II

The District Court erred in denying this defendant's motion for a decree and judgment in her favor.

III

The District Court erred in granting plaintiff's motion for a decree and judgment in his favor.

IV

The District Court erred in the making of the following findings of fact which were adopted by it in the making of its decree and judgment, to wit:

(a) "The court finds that the plaintiff, Ernest U. Schroeter, was at the time of the filing of this bill in equity, and still is, the duly elected, qualified and acting

trustee in bankruptcy of and for the estate of B. F. Baum, Bankrupt. That the plaintiff is and was a resident and is and was a citizen of the State of California, residing in the City of Los Angeles, County of Los Angeles, and in the Southern District of California. That the defendant B. F. Baum, whose full name is Benjamin F. Baum, was duly adjudicated a bankrupt on the 6th day of November, 1931, and on the 6th day of November, 1931 this court duly and regularly made, gave and entered its order adjudicating Benjamin F. Baum a bankrupt within the meaning and purview of the National Bankruptcy Act of 1898 and the amendments thereto. That at the time of the making of such adjudication Benjamin F. Baum, the bankrupt, filed his schedules in bankruptcy wherein under oath he purported to set forth in Schedule B a list of all of his assets, real and personal, but which did not disclose the mining property hereinafter described. That at the time of the making of said schedules and the filing thereof on the 6th day of November, 1931, at the time of the making of the decree of adjudication in bankruptcy as to said Benjamin F. Baum, said Benjamin F. Baum was the owner of an interest in a certain group of mining claims with water rights appertaining thereto, commonly known as the Camp Rock Mining property and also as Camp Rock Mines, situate in the Belleville Mining District in the County of San Bernardino, State of California. That the said property was and is more particularly known and described in the plaintiff's bill in equity as follows:

Royal Placer Claim No. 1, as per description recorded in Book 171, page 64, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 2, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 3, as per description recorded in Book 171, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 4, as per description recorded in Book 179, page 65, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 5, as per description recorded in Book 171, page 66, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 6, as per description recorded in Book 171, page 67, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 7, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 8, as per description recorded in Book 171, page 68, Mining Records, County of San Bernardino, California.

Royal Placer Claim No. 9, as per description recorded in Book 171, page 69, Mining Records, County of San Bernardino, California.

Gold Junction Quartz Claim, as per description recorded in Book 168, page 189, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 1, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California.

Gold Bar Claim No. 2, as per description recorded in Book 168, page 183, Mining Records, County of San Bernardino, California;

all of said property being situate in the County of San Bernardino, in the Belleville Mining District, State of California.

That all the mining property referred to is situate in San Bernardino County, and that the bankruptcy of Benjamin F. Baum was filed at the place of his residence, at Los Angeles, California, and the administration of the estate of Benjamin F. Baum was administered through this court at Los Angeles, California, being referred to a Referee appointed, sitting and acting for and in the County of Los Angeles, California."

(b) "That at the time of the making of said schedules and the filing thereof on the 6th day of November, 1931, at the time of the making of the decree of adjudication in bankruptcy as to said Benjamin F. Baum, said Benjamin F. Baum was the owner of an interest in a certain group of mining claims with water rights appertaining thereto, commonly known as the Camp Rock Mining property and also as Camp Rock Mines, situate in the Belleville Mining District in the County of San Bernardino, State of California."

(c) "The court finds that at the time of the adjudication of Benjamin F. Baum as a bankrupt on the 6th day of November, 1931, Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12 day of September, 1931, and less than sixty days

prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining property.

That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum's contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum's, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at a date in the future and at a time when said Benjamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's, creditors. That on September 12, 1931, Benjamin F. Baum made and delivered to Walter Granger Kleinschmidt an instrument purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described.

The court finds that thereafter proceedings for the administration of Benjamin F. Baum as a bankrupt were had, that Benjamin F. Baum did not disclose to the trustee in bankruptcy in his estate, to-wit, Ernest U.

Schroeter, nor to the Referee in Bankruptcy before whom the bankruptcy proceeding was pending, nor to the creditors of Benjamin F. Baum, that Benjamin F. Baum had an interest or had had any interest in and to the said Camp Rock mining property hereinbefore described, or any contractual or other interest therein or thereto.

That the total assets of the estate of Benjamin F. Baum as administered was less than the sum of \$800.00, and there was paid to the creditors of Benjamin F. Baum, through the medium of his bankruptcy, a dividend of less than one per cent on the dollar of such obligations of Benjamin F. Baum. That Benjamin F. Baum petitioned the court for his discharge, and on the 4th day of April, 1932, the court duly made, gave and entered its order discharging Benjamin F. Baum from his debts, as a bankrupt. The court finds that in the month of February, 1932 and during the time of the administration of the estate of Benjamin F. Baum as a bankrupt, Benjamin F. Baum made, executed and delivered to Walter Granger Kleinschmidt a quitclaim deed attempting to convey and purporting to convey the interest of the bankrupt, Benjamin F. Baum, in and to the Camp Rock Mining property hereinbefore described, to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt accepted said deed and the same was recorded with the County Recorder of San Bernardino County. That none of said facts was known at said time to the trustee in bankruptcy, nor to the court, nor to the creditors of Benjamin F. Baum. That no order of court was obtained permitting the conveyance of said property. That Benjamin F. Baum informed Walter Granger Kleinschmidt, during the pendency of his bankruptcy administration,

that he was a bankrupt, and the said Walter Granger Kleinschmidt knew, during the period of administration of the estate of Benjamin F. Baum, that Benjamin F. Baum had been adjudicated a bankrupt and that his status was that of a bankrupt.”

(d) “The court finds that at the time of the adjudication of Benjamin F. Baum as a bankrupt on the 6th day of November, 1931, Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12 day of September, 1931, and less than sixty days prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining property.

That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum’s, contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum’s, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at a date in the future and at a time when said Ben-

jamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's, creditors. That on September 12, 1931, Benjamin F. Baum made and delivered to Walter Granger Kleinschmidt an instrument purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described."

(e) "The court finds that the estate of Benjamin F. Baum was closed and the administration thereof closed in the year 1932, without there being disclosed to the court or to the trustee of said estate, or to the creditors thereof, any information or knowledge concerning the interest of Benjamin F. Baum in and to the said Camp Rock Mining properties hereinbefore described, nor concerning the purported conveyances of the interest of the bankrupt B. F. Baum therein and thereto.

The court finds that in the month of November, 1931 and thereafter, Benjamin F. Baum continued to endeavor to sell the mining properties known as the Camp Rock Mining property hereinbefore described, acting on behalf of himself and Walter Granger Kleinschmidt and at the special instance and request of Walter Granger Kleinschmidt, and four days after the granting of the discharge in bankruptcy to Benjamin F. Baum, Benjamin F. Baum did, to-wit, on the 8th day of April, 1932, succeed in obtaining a purchaser for said property who agreed in writing to pay for said Camp Rock Mining properties the total sum of Fifty Thousand Dollars (\$50,000.00); that said purchaser consisted of Frank Llewellyn and Charles Evans.

The court finds that thereafter, by an agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum on one part, and Frank Llewellyn on the other, One Thousand Dollars (\$1,000.00) which had been paid on account of but not in full of the Fifty Thousand Dollars purchase price, was credited to Frank Llewellyn, and Charles Evans as a purchaser was eliminated and a new agreement was entered into and executed between the parties in writing, to-wit, Walter Granger Kleinschmidt as vendor and Frank Llewellyn as purchaser, under the terms of which Walter Granger Kleinschmidt purported to sell, and Frank Llewellyn agreed to buy and pay for the said Camp Rock Mining properties at an agreed price of Forty-nine Thousand Dollars (\$49,000.00). That said instrument was dated the 10 day of May, 1932.

The court finds that all of the Forty-nine Thousand Dollars provided for under the terms of the last mentioned agreement has been paid to Walter Granger Kleinschmidt and the estate of Walter Granger Kleinschmidt, Deceased.

The court finds that on the 15th day of November, 1932, Walter Granger Kleinschmidt made, executed and delivered to B. F. Baum an assignment in writing wherein and whereby said Walter Granger Kleinschmidt agreed to pay to Benjamin F. Baum fifty per cent of the amount of moneys received by him from the sale or lease of the Camp Rock Mining properties. The court finds that Walter Granger Kleinschmidt received a total of Forty-nine Thousand Dollars from the sale of said Camp Rock Mining properties. The court finds that the said conveyance and assignment was made by Walter Granger

Kleinschmidt after Benjamin F. Baum had obtained his discharge in bankruptcy from this court in the matter of the bankruptcy proceedings of Benjamin F. Baum and after he had freed himself from the obligations to his, Benjamin F. Baum's creditors, and the said conveyance was made in compliance with, pursuant to and in accordance with the original agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum respecting the return to Benjamin F. Baum of his interests in the Camp Rock Mining property."

(f) "The court finds that it was contemplated between Benjamin F. Baum and Walter Granger Kleinschmidt that there should be paid out of the sales price of the Camp Rock Mining properties to one Frank Murray and his associates, twenty per cent of the profits of the Camp Rock mining deal. That the said Camp Rock mining deal consisted of the acquiring of the Camp Rock Mining properties from Henry C. Stock and Charles Pohl at a purchase price of Twenty-one Thousand, Eight Hundred Dollars (\$21,800.00), the sale thereof for Forty-nine Thousand Dollars (\$49,000.00), leaving a profit of Twenty-seven Thousand, Two Hundred Dollars (\$27,200.00), and that there should be paid to said Murray twenty per cent of Twenty-seven Thousand, Two Hundred Dollars, or Five Thousand, Four Hundred and Forty Dollars (\$5,440.00); that there should be given a credit, therefore, to the defendants in this proceeding for the Five Thousand, Four Hundred Forty Dollars (\$5,440.00) to be paid to Murray, leaving Twenty-one Thousand, Seven Hundred Sixty Dollars (\$21,760.00); that Twenty-one Thousand, Seven Hundred and Sixty Dollars (\$21,760.00) is the amount received by Walter Granger Klein-

schmidt from the sale of the Camp Rock property; that one-half thereof is the sum of Ten Thousand, Eight Hundred and Eighty Dollars (\$10,880.00).

And that therefore, notwithstanding the recital in the assignment of November 15, 1932, that Kleinschmidt was to pay one-half of the money received by him, to-wit, the assignment from Walter Granger Kleinschmidt to Benjamin F. Baum, the court finds that there should be credited to the defendants the said twenty per cent of the profits to be paid to Murray, and that there should also be deducted the amount of money which Walter Granger Kleinschmidt paid to the persons from whom he purchased the mining property, to-wit, Henry C. Stock and Charles Pohl, to-wit, the sum of Twenty-one Thousand Eight Hundred Dollars (\$21,800.00), and the court finds that there was paid to Walter Granger Kleinschmidt the amount remaining, Twenty-one Thousand, Seven Hundred Dollars (\$21,700.00), and that fifty per cent thereof is the sum of Ten Thousand, Eight Hundred Eighty Dollars (\$10,880.00).

The schedule of payments, therefore, is as follows:

To Frank Murray—twenty per cent of the profit, \$27,200.00	\$ 5,440.00
To Walter Granger Kleinschmidt—the amount remaining after the deduction of the payment to the original vendors Henry C. Stock and Charles Pohl and the payment to Murray	21,760.00

That the amount agreed to be paid, therefore, by Walter Granger Kleinschmidt to B. F. Baum is one-half of Twenty-one Thousand, Seven Hundred Sixty Dollars (\$21,760.00), or the sum of.....\$10,880.00

The court finds that none of said sum has been paid by Walter Granger Kleinschmidt, nor by the Estate of Walter Granger Kleinschmidt, nor by Margaret D. Kleinschmidt as Administratrix of the Estate of Walter Granger Kleinschmidt, to the plaintiff, nor to the Estate of Benjamin F. Baum, a bankrupt, and all thereof is due, owing and unpaid, and that there exist no credits, nor offsets, to which the defendants or any of them are or ought to be entitled."

(g) "The court finds that it was contemplated between Benjamin F. Baum and Walter Granger Kleinschmidt that there should be paid out of the sales price of the Camp Rock Mining properties to one Frank Murray and his associates, twenty per cent of the profits of the Camp Rock mining deal."

(h) "The court finds that for more than sixty days continuously prior to the 6th of November, 1931, Benjamin F. Baum was insolvent. The court finds that the trustee in bankruptcy of the estate of Benjamin F. Baum and the creditors thereof did not discover, nor did it come to their attention, that Benjamin F. Baum had ever had any interest in the Camp Rock Mining property hereinbefore described, until on or about the 3rd day of January, 1936. Thereupon, in proceedings duly had by a creditor to reopen the estate of Benjamin F. Baum and for a rereference thereof for further administration, this court duly made its order on the 3rd day of January, 1936, which order was and is in words, letters and figures as follows, to-wit, a copy:

‘IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 17686-M

In the Matter of)	
	)	ORDER RE-OPENING
BENJAMIN F. BAUM,	)	BANKRUPTCY
	)	PROCEEDINGS AND
Bankrupt	)	RE-REFERENCE

‘A petitioner herein having filed his petition praying for the re-opening of this estate and its re-reference, on the ground that there is property which was not disclosed to the Bankruptcy Court nor to the Trustee thereof nor to the creditors and alleging that the same should be recovered and administered upon and good cause therefor appearing, it is hereby

‘ORDERED, that the estate of the above named bankrupt be, and the same hereby is, re-opened for further proceedings herein and, it is further

‘ORDERED, that this matter be, and it hereby is, re-referred to Referee in Bankruptcy, James L. Irwin, with instructions to elect a Trustee, examine the bankrupt, and take such other appropriate proceedings as are necessary for the administration of the property of the estate.

Los Angeles, California, January 3, 1936.

Paul J. McCormick
Judge

That thereafter an order was duly made, given and rendered re-electing and reappointing Ernest U. Schroeter as trustee in bankruptcy of the estate of B. F. Baum on reopening, and said Ernest U. Schroeter, the plaintiff, prior to the commencement of this action and prior to the filing of his creditor's claim in the matter of Walter Granger Kleinschmidt, Deceased, qualified in the manner provided by law and in the manner provided for in the order so appointing him and electing him on reopening as trustee, and said plaintiff has been at all times, therefore, the duly elected, qualified and acting trustee in bankruptcy of the estate of Benjamin F. Baum, Bankrupt."

(i) "The court finds that for more than sixty days continuously prior to the 6th of November, 1931, Benjamin F. Baum was insolvent. The court finds that the trustee in bankruptcy of the estate of Benjamin F. Baum and the creditors thereof did not discover, nor did it come to their attention, that Benjamin F. Baum had ever had any interest in the Camp Rock Mining property hereinbefore described, until on or about the 3rd day of January, 1936."

VI

The District Court erred in adopting its conclusions of law upon which said decree and judgment of the above entitled court is based in that said conclusions are not supported but are contrary to the findings of fact entered herein and to the evidence upon which the same were based.

VII

The District Court erred in adopting said decree and judgment in that said decree and judgment denied this

defendant the relief prayed for in her answer to the bill of complaint herein, namely, the dismissal of the bill of complaint with costs.

VIII

The District Court erred in overruling each and every of this defendant's objections and sustaining each and every of plaintiff's objections upon the trial of the cause herein.

IX

The District Court erred in denying the motion of this defendant to dismiss the bill of complaint as against her on the ground that the same was not supported and was contrary to the evidence adduced herein, to the denial of which motion timely exception was noted by said defendant.

X

The District Court erred in making said decree and judgment in the amount of \$10,880 instead of the sum of \$2,200.00.

XI

The District Court of the United States for the Southern District of California did not have jurisdiction of the parties to the action in that no diversity of citizenship existed between the plaintiff and the defendant, Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased.

XII

The District Court of the United States for the Southern District of California did not have jurisdiction of the subject matter of the action in that the bill of complaint and the evidence in said case shows that no diversity of citizenship existed between the plaintiff in said action and the defendants in said action.

Now, Therefore, in order that the foregoing assignments may be and appear on record, this defendant presents the same, and prays that said assignments may be filed and that such disposition may be made thereof as is in accordance with the laws of the United States in that behalf made and provided, and prays that said decree and judgment herein be reversed, and that the District Court of the United States for the Southern District of California be directed to enter a decree in favor of this defendant in accordance with the prayer of her answer to the bill of complaint on file herein, or that the amount of said decree and judgment be reduced to the sum of \$2200.00 as may be meet and proper in the premises.

Dated: March 19th, 1937.

Pillsbury Madison & Sutro

Attorneys for defendant, Margaret D. Kleinschmidt.
as administratrix, etc.

[Endorsed]: Filed Mar 19 1937 R. S. Zimmerman,
Clerk By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, MARGARET D. KLEINSCHMIDT, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, as principal, and PACIFIC INDEMNITY COMPANY, a corporation organized and existing under the laws of the State of California, as surety, are held and firmly bound unto Ernest U. Schroeter, as trustee in bankruptcy of the estate of B. F. Baum, a bankrupt, in the full and just sum of \$250.00, to be paid to the said Ernest U. Schoeter, as trustee in bankruptcy of the estate of B. F. Baum, a bankrupt, his certain attorney, executor, administrator or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of March, in the year of our Lord, one thousand nine hundred and thirty-seven.

Whereas, lately in the District Court of the United States for the Southern District of California, Central Division, in a suit pending in said court, between Ernest U. Schroeter, as trustee in bankruptcy of the estate of B. F. Baum, a bankrupt, plaintiff, and B. F. Baum, Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, et al., defendants, a decree and judgment was rendered against the defendants B. F. Baum and Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased; and the said defendant, Margaret D.

Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, having obtained from said court an order allowing an appeal to reverse the decree and judgment in the aforesaid suit, and a citation directed to the said Ernest U. Schroeter, as trustee in bankruptcy of the estate of B. F. Baum, a bankrupt, citing and admonishing him to be and appear in a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now the condition of the above obligation is such that the said Margaret D. Kleinschmidt, as administratrix of the estate of Walter Granger Kleinschmidt, deceased, shall prosecute her appeal to effect and answer for damages and costs if she fail to make her plea good, then the above obligation to be void else to remain in full force and virtue.

Margaret D Kleinschmidt

As Administratrix of the Estate of Walter Granger
Kleinschmidt, Deceased.

PACIFIC INDEMNITY COMPANY,

By J. W. Maynard Jr.

Its Attorney in Fact.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles)

On this 19th day of March in the year one thousand nine hundred and 37 before me, ATALA M. CARTER a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. W. MAYNARD, JR. known to me to be

the duly authorized Attorney-in-Fact of PACIFIC INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said J. W. MAYNARD, JR acknowledged to me that he subscribed the name of PACIFIC INDEMNITY COMPANY, thereto as surety and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

Atala M. Carter

Notary Public in and for LOS ANGELES County,
State of California.

My Commission Expires May 28, 1938.

Examined and recommended for approval as provided
in Rule 28 of the District Court.

Pillsbury, Madison & Sutro

Attorneys for defendant, Margaret D. Kleinschmidt, as administratrix, etc.

I hereby approve the foregoing bond.

Dated: March 19th, 1937.

Geo Cosgrave

United States District Judge

[Endorsed]: Filed Mar 19 1937 R. S. Zimmerman,
Clerk By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON
APPEAL FROM DECREE

To R. S. Zimmerman, Clerk of the above entitled court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal from the decree heretofore allowed in the above entitled proceeding, and to include in said transcript the following:

1. Bill of complaint;
2. Answer of defendant, Margaret D. Kleinschmidt, to the bill of complaint;
3. Amendment to answer of defendant, Margaret D. Kleinschmidt, to bill of complaint;
4. Minute order denying motion to dismiss;
5. Findings of fact and conclusions of law;
6. Judgment and decree;
7. Statement of evidence, as required by Equity Rule 75, as hereafter approved by the above entitled court;
8. Summons to join in appeal;
9. Motion for severance after refusal to join in appeal;

10. Order of severance;
11. Petition for appeal from judgment and decree, and order allowing appeal;
12. Assignment of errors thereon;
13. Bond on appeal;
14. Citation on appeal;
15. This praecipe;
16. Clerk's certificate.

Dated this 19th day of May, 1937.

Pillsbury, Madison & Sutro
Attorneys for Defendant and Appellant,
Margaret D. Kleinschmidt

[Endorsed]: Filed May 24 1937 R. S. Zimmerman,
Clerk By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 190 pages, numbered from 1 to 190 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; answer; amendment to answer; findings of fact and conclusions of law; judgment and decree; statement of evidence; summons to join in appeal; motion for severance after refusal to join in appeal; order of severance; petition for appeal and order allowing appeal; assignment of errors; bond on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of September, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

No. 8662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Klein-
schmidt, Deceased,

Appellant,

VS.

ERNEST U. SCHROETER, as Trustee in Bank-
ruptcy of the Estate of B. F. Baum, a
Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

ALFRED SUTRO,

FELIX T. SMITH,

JOHN A. SUTRO,

SAMUEL L. WRIGHT,

CHARLES F. PRAEL,

Standard Oil Building, San Francisco,

Solicitors for Appellant.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building, San Francisco,

Of Counsel.

FILED

OCT 21 1937

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No. 8662

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Klein-
schmidt, Deceased,

Appellant,

VS.

ERNEST U. SCHROETER, as Trustee in Bank-
ruptcy of the Estate of B. F. Baum, a
Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT AS TO JURISDICTION.

This is an appeal from a final judgment and decree of the United States District Court for the Southern District of California, Central Division (Tr. pp. 53-57), against the appellant in the amount of \$10,880.

This equity suit was commenced under sections 70 and 70(e) of the Bankruptcy Act to set aside and void transfers of property alleged to consist of the interest of the bankrupt Baum in and to certain mining properties which were located in said Southern District, to recover the value of the property so transferred (Tr. pp. 5, 6) and to com-

pel an accounting by the defendant of all proceeds derived from the alleged sale of the bankrupt's interest in the property. The District Court had original jurisdiction of the suit under section 70(e) of the Bankruptcy Act (U.S.C. 11:110(e)). This section provides as follows:

“The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as defined in this title,¹ and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.”

This court has jurisdiction upon appeal to review the District Court's decree under section 128 of the Judicial Code (U.S.C. 28:225):

“(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345² of this title.”

1. Section 1 of the Bankruptcy Act (U.S.C. 11:1) defines a “court of bankruptcy”: “* * * ‘courts of bankruptcy’ shall include the *district courts of the United States*, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii, and Porto Rico; * * *.”

2. U.S.C. 28:345 is not involved in this case.

STATEMENT OF THE CASE.

This is a suit brought by the trustee in bankruptcy of B. F. Baum to recover for an alleged fraudulent conveyance by Baum of an interest in a mine immediately prior to his adjudication as a bankrupt. The bill alleges that at the time and immediately prior to his adjudication, Baum was the owner of an undivided one-half interest in the Camp Rock Placer Mine. He and Walter G. Kleinschmidt, it states, conspired to defraud Baum's creditors. As a part of the conspiracy, Baum conveyed to Kleinschmidt his interest in the mine which Kleinschmidt agreed to hold for Baum until Baum's discharge in bankruptcy. It further alleges that after Baum's discharge in bankruptcy, Kleinschmidt sold the mine and received the proceeds therefrom, half of which proceeds plaintiff claims belongs to Baum's creditors.

The suit was commenced by Baum's trustee against Baum and the administratrix of Kleinschmidt's estate. The district court rendered its judgment and decree against both defendants for \$10,880, which sum is equal to one half of the proceeds derived from the sale of the mine after the deduction of certain expenses. Appellant here, Margaret D. Kleinschmidt, as administratrix of the estate of Walter G. Kleinschmidt, appealed. Baum declined to appeal (Tr. p. 165) and the district court made an order of severance.

Appellant contends that the judgment and decree of the district court should be reversed by reason of the insufficiency of the evidence to support the findings necessary to establish a fraudulent conveyance, in the following respects:

1. Baum never had a half interest in the mine;
2. He forfeited the interest which he had prior to his adjudication as a bankrupt;
3. The conveyances which he made conveyed only the bare legal title to Kleinschmidt and were merely for the purpose of clearing the record title;
4. The compensation which Kleinschmidt agreed to pay Baum was for services rendered Kleinschmidt after Baum's adjudication in bankruptcy and to which plaintiff has no right; and
5. There is no proof of either fraud or conspiracy nor of facts from which fraud can be inferred.

The questions thus involved in this appeal are raised by the appellant's motion to dismiss the cause against the appellant in her representative capacity, to the denial of which motion the appellant made timely exception (Tr. p. 88), by the appellant's motion for a judgment and decree in her favor (Tr. p. 163), and by the assignment of errors (Tr. pp. 170-185).

THE FACTS.

On April 16, 1931, J. W. Sullivan contracted to purchase mining property known as Camp Rock Placer Mine for \$20,000 payable in monthly installments of \$1,000. The contract provided for forfeiture by the purchaser of his interest in the event he defaulted in any of the payments (Tr. pp. 90-93).

On April 24, 1931, Sullivan agreed with defendant B. F. Baum and Walter G. Kleinschmidt, deceased, that the

three should share in the cost of purchasing and operating the mine and should divide the profits from the operation or sale of it equally among them after the payment of 20 per cent of such profits to one Murray and seven others, i. e., each of the three were to advance at least \$333.33 (one third of the purchase money installments) on or before the 15th of each month and were each to receive $26\frac{2}{3}$ per cent of the profits. The contract provided (Tr. p. 85):

“In the event that any of the said parties fail or refuse to supply his proportion of the required funds, when and as said funds are required as herein set forth, time being the essence of this requirement, then, and in that event, the other parties hereto shall have the right to pay such sums as are required, and in that event, any and all interests owned by said defaulting party in and to said agreement for sale of mining property, or in or to said property, shall be deemed forfeited; provided, however, that any and all moneys paid under and by virtue of said agreement shall be repaid to said defaulting party at the rate of five (5) per cent. of any and all profits produced by said property, after said property has been fully paid for, and good and sufficient deed conveying said property shall have been executed and delivered to the other two parties; or in the event of sale of said Camp Rock Placer Mine, said defaulting party shall be paid at the rate of twenty six and two-thirds ($26\frac{2}{3}$) per cent. of the payment made under said sale until he has received an amount equal to the amount of money which he has supplied under this agreement” (italics ours).

Sullivan delivered to Baum and Kleinschmidt each an assignment (Tr. pp. 62-64, 96-98) of $33\frac{1}{3}$ per cent of his

(Sullivan's) interest as purchaser under the contract to purchase the mine, dated April 16, 1931.

Up to and including the payment due on August 15, 1931, the fifth payment, each of the three advanced his share on the purchase installment. On September 15, 1931, Baum failed to make any payment and thus defaulted under the agreement with Kleinschmidt and Sullivan (Tr. pp. 99, 133-134, 147, 149, 152). Baum made five payments of \$333.33 each, or a total of \$1,666.65, toward the purchase price of the mine (Tr. p. 149). He contributed nothing after August 15, 1931, and the payments he had contracted to make were thereafter made by Kleinschmidt.

On September 23, 1931, Baum executed an instrument, presented to him by Kleinschmidt, entitled "Assignment", and which provided, after describing the Camp Rock Placer Mine, that:

"* * * I, B. F. Baum, do hereby assign, transfer and set over unto Walter G. Kleinschmidt, twenty-six and two-thirds ($26\frac{2}{3}\%$) per cent. of all of the right, title and interest of the purchaser, as set forth herein" (Tr. pp. 94-96).

The instrument is patterned after the assignment delivered to Baum and Kleinschmidt by Sullivan. It was not prepared by the attorney who was at the time acting for Kleinschmidt in matters regarding the mine (Tr. pp. 134, 137-138).

On November 6, 1931, Baum was adjudicated a bankrupt (Tr. p. 59). The schedules filed by Baum did not show that he owned or claimed any interest in the Camp Rock Placer Mine, a right to any of the profits to be

derived from the operation or sale of the mine or any rights to receive from any profits from the sale of the mine any reimbursement for the money he had contributed to the purchase of the mine.

On December 15, 1931, Sullivan failed to pay his installment of the purchase price of the mine and he thus also defaulted under his contract with Kleinschmidt and Baum (Tr. p. 133). He admitted in a letter to Kleinschmidt, dated December 14, 1931 (Tr. p. 101) that he had forfeited his interest in the mine and had only a right of reimbursement for money advanced by him. All payments on the purchase price of the mine were thereafter made by Kleinschmidt and continued at the rate of \$1,000 a month until November 1, 1933, when the final installment was paid (Tr. pp. 132-133).

On April 7, 1932, Baum acknowledged the execution of a quitclaim deed to Kleinschmidt, dated February 29, 1932, of all his right, title and interest in and to the mine (Tr. pp. 65-67). This deed was recorded on July 30, 1932, and was prepared by Kleinschmidt's attorney, who testified he obtained it from Baum to clear title to the property, as he felt the instrument executed on September 23, 1931, by Baum "assigning" a $26\frac{2}{3}$ per cent interest, was ambiguous (Tr. p. 134). Baum was discharged from bankruptcy on April 4, 1932 (Tr. 102).

At the time the parties first became interested in the mine, in April, 1931, Kleinschmidt was auditor for the Southern California Telephone Company and resided in Los Angeles, where the above described events took place. In May, 1931, he became treasurer of The Pacific Tele-

phone and Telegraph Company in San Francisco, near where he thereafter resided (Tr. pp. 136-137, 162). When Kleinschmidt was transferred to San Francisco, he asked Baum to look after his interest (Tr. p. 151).

As early as July, 1931, Baum attempted to obtain purchasers of the property (Tr. p. 152). After Baum had defaulted in his contract with Kleinschmidt and Sullivan, he continued with his efforts to sell the mine. In September, 1931, he told Kleinschmidt he wanted \$5,000 cash, if he found a cash buyer. Kleinschmidt said he would make a satisfactory agreement but no definite agreement was then made (Tr. pp. 156-157). In November, 1931, Kleinschmidt told Baum the mine would have to be sold or it would be lost (Tr. p. 160). At this time Kleinschmidt was paying $66\frac{2}{3}$ per cent of the \$1,000 monthly installments, and, beginning with December, he alone paid the whole of each installment of \$1,000.

In the spring of 1932, Baum obtained two purchasers, Llewellyn and Evans, who agreed to buy the mine for \$50,000 (Tr. pp. 136, 150-153). On April 18, 1932, Kleinschmidt contracted to sell the mine to these purchasers for \$50,000 (Tr. pp. 140-146). Shortly thereafter, Evans dropped out, and a new contract was made to sell the mine to Llewellyn alone (Tr. pp. 102-107). This contract provided for payment in monthly installments, and was eventually fulfilled by Llewellyn.

On November 15, 1932, Kleinschmidt executed and delivered to Baum an instrument by which he granted and assigned to B. F. Baum 50 per cent "of any and all amounts of money received by me from the sale or lease

of the Camp Rock Placer Mine'' after certain deductions (Tr. pp. 68-69). This instrument was recorded on December 15, 1932. The amount to be paid to Baum pursuant to this instrument the court found to be one half the sum of \$21,760, or the sum of \$10,880 (Tr. p. 45). Seven thousand dollars was paid to Baum by Kleinschmidt prior to the bringing of this action (Tr. p. 155).

**SPECIFICATION OF ASSIGNMENT OF ERRORS
RELIED UPON.**

The appellant relies upon the following Assignment of Errors:

IV (b).....	Tr. p. 173
IV (d).....	Tr. p. 176
IV (e).....	Tr. pp. 177-179
IV (f).....	Tr. pp. 179-181
IX	Tr. p. 184
X	Tr. p. 184

SUMMARY OF THE ARGUMENT.

I. The court's findings that Baum conveyed an interest in the Camp Rock Placer Mine to Kleinschmidt are not supported by the evidence; he forfeited his interest in the mine by failing to make a payment due on September 15, 1931, prior to the making of any conveyance by him to Kleinschmidt and prior to his adjudication in bankruptcy.

(a) The court in Findings I and II found that Baum at the time of his adjudication in bankruptcy

was the owner of an interest in the Camp Rock Mine. These findings are erroneous as he had forfeited his interest in the mine by his failure to pay the installment due on September 15, 1931.

(b) Baum never conveyed any interest in the mine to Kleinschmidt; consequently there was no fraudulent conveyance, the assignment and the quitclaim deed being merely evidence of the forfeiture and an attempt to clear the record title to the mine.

II. The only right remaining to Baum after his default and forfeiture of September 15, 1931, was the right to be reimbursed upon certain conditions for the money he had advanced and his trustee in bankruptcy can recover no more than such a sum, to wit, \$2,200.

III. The court's findings that Kleinschmidt delivered to Baum the instrument dated November 15, 1932, by which he agreed to pay Baum \$10,880 out of the proceeds of the sale of Camp Rock Placer Mine, pursuant to an agreement to defraud Baum's creditors and to return to Baum his interest in the mine, are not supported by the evidence; the evidence showed this instrument was delivered in consideration of services rendered by Baum after his adjudication in bankruptcy.

(a) The court's finding that the instrument of November 15, 1932, was delivered pursuant to an agreement to return to Baum his interest in the mine is contradicted by the only evidence on the point.

(b) There is not only no evidence of fraud in this case but the facts shown by the evidence are con-

sistent only with a course of lawful, fair and honest dealing.

(c) Baum's trustee in bankruptcy is not entitled to Baum's earnings after his adjudication in bankruptcy nor the compensation Kleinschmidt agreed to pay Baum for services rendered after Baum's adjudication in bankruptcy.

ARGUMENT OF THE CASE.

I.

THE COURT'S FINDINGS THAT BAUM CONVEYED AN INTEREST IN THE CAMP ROCK PLACER MINE TO KLEINSCHMIDT ARE NOT SUPPORTED BY THE EVIDENCE; HE FORFEITED HIS INTEREST IN THE MINE BY FAILING TO MAKE A PAYMENT DUE ON SEPTEMBER 15, 1931, PRIOR TO THE MAKING OF ANY CONVEYANCE BY HIM TO KLEINSCHMIDT AND PRIOR TO HIS ADJUDICATION IN BANKRUPTCY.

ASSIGNMENT OF ERRORS.

IV. The District Court erred in the making of the following findings of fact which were adopted by it in the making of its decree and judgment, to wit:

(b) "That at the time of the making of said schedules and the filing thereof on the 6th day of November, 1931, at the time of the making of the decree of adjudication in bankruptcy as to said Benjamin F. Baum, said Benjamin F. Baum was the owner of an interest in a certain group of mining claims with water rights appertaining thereto, commonly known as the Camp Rock Mining property and also as Camp Rock Mines, situate in the Belleville Mining District in the County of San Bernardino, State of California."

(d) “The court finds that at the time of the adjudication of Benjamin F. Baum as a bankrupt on the 6th day of November, 1931, Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12 day of September, 1931, and less than sixty days prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining property.

That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum's, contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum's, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at a date in the future and at a time when said Benjamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's, creditors. That on September 12, 1931, Benjamin F. Baum made and delivered to Walter Granger Kleinschmidt an instrument

purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described.”

IX. The District Court erred in denying the motion of this defendant to dismiss the bill of complaint as against her on the ground that the same was not supported and was contrary to the evidence adduced herein, to the denial of which motion timely exception was noted by said defendant.

- (a) **The court in Findings I and II found that Baum at the time of his adjudication in bankruptcy was the owner of an interest in the Camp Rock Mine. These findings are erroneous as he had forfeited his interest in the mine by his failure to pay the installment due on September 15, 1931.**

The gravamen of the plaintiff's action is that prior to Baum's adjudication in bankruptcy, he was the owner of an undivided one-half interest in and to the Camp Rock Placer Mine and conveyed this interest to Kleinschmidt in contemplation of his bankruptcy, and that Kleinschmidt, subsequent to the discharge of the bankrupt, reconveyed the interest to Baum (Tr. pp. 8, 9, 10, 11-12).

The prayer of the complaint (Tr. p. 16) is for the recovery of \$25,000, which is alleged to be the value of the half interest so conveyed by Baum in defraud of his creditors (Tr. p. 13). Consequently, to recover in this case plaintiff must prove first, that Baum had an interest in the Camp Rock Placer Mine, second, that he conveyed this interest to Kleinschmidt, and third, that this was done in defraud of Baum's creditors prior to his adjudication in bankruptcy. The trial court in its findings of fact I and II specifically found that at the time of the adjudication in bankruptcy Baum was the owner of an interest

in the Camp Rock Placer Mine and that Baum prior to the adjudication conveyed his interest in the mine to Kleinschmidt and that Kleinschmidt agreed to reconvey the interest when Baum should be freed of the obligation of Baum's creditors (Tr. pp. 37, 38, 39). We contend that these findings are contrary to the undisputed evidence in this case.

We will show that (1) Baum had no interest in the mine subsequent to the 15th of September, 1931, (2) he never at any time conveyed an interest in the mine to Kleinschmidt, and (3) the trustee in bankruptcy's right, if any, is only one to recover the money which Baum contributed to the joint adventure.

By the agreement of April 16, 1931 (Tr. pp. 90-93) Sullivan contracted to purchase the mine. Eight days later Sullivan entered into an agreement with Baum and Kleinschmidt whereby the three agreed to purchase the mine jointly. Sullivan's agreement provided (Tr. p. 91) that he, as purchaser, would have to pay the vendors \$1,000 per month, and in the event of the failure to pay this sum the vendors "and each of them shall be released from all obligation, both at law and in equity, to convey said property; and, in such event, the purchaser shall forfeit all right to said property, and all payments theretofore made by him shall be forfeited to the said vendors" (Tr. p. 92). It was only natural, therefore, for the three parties, when they entered into the agreement of the 24th of April, 1931, to make some provision in the event one or two of the parties defaulted in his or their payments to be made on the mine, so that the parties who were not in default could make the payments of the defaulting party

and thus protect the interest of the nondefaulting party or parties in the mine. Consequently, the agreement provided in part as follows (Tr. pp. 84-85):

“It is Further Understood and Agreed that the said Walter G. Kleinschmidt, Benjamin F. Baum and J. W. Sullivan each agree to supply one-third ($\frac{1}{3}$) of the necessary funds required to apply on the purchase price, or to operate the property, so that the funds so supplied from said Walter G. Kleinschmidt, Benjamin F. Baum and J. W. Sullivan, in equal amounts, will equal one hundred (100) per cent. of the funds so required. *In the event that any of the said parties fail or refuse to supply his proportion of the required funds, when and as said funds are required as herein set forth, time being the essence of this requirement, then, and in that event, the other parties hereto shall have the right to pay such sums as are required, and in that event, any and all interests owned by said defaulting party in and to said agreement for sale of mining property, or in or to said property, shall be deemed forfeited; provided, however, that any and all moneys paid under and by virtue of said agreement shall be repaid to said defaulting party at the rate of five (5) per cent. of any and all profits produced by said property, after said property has been fully paid for, and good and sufficient deed conveying said property shall have been executed and delivered to the other two parties; or in the event of sale of said Camp Rock Placer Mine, said defaulting party shall be paid at the rate of twenty six and two-thirds ($26\frac{2}{3}$) per cent. of the payment made under said sale until he has received an amount equal to the amount of money which he has supplied under this agreement”* (italics ours).

As above stated, the “necessary funds required to apply on the purchase price” were monthly payments of \$1,000 specified in Sullivan’s contract, the agreement of April 16, 1931. Therefore, each of the three, Sullivan, Baum and Kleinschmidt, were required to advance at least \$333.33 each month, or in the event of the failure of any one of them to do so, his interest would be forfeited in the event his share was advanced by the others.

The uncontradicted evidence at the trial showed that Baum made a total of five payments of \$333.33, pursuant to the agreement of April 24, 1931, and no more. These were the payments for the months of April, May, June, July and August, 1931. He made no payments after August 15, 1931, and consequently was in default upon the 16th of September, 1931, for his failure to make the payment due on the 15th of that month (Tr. pp. 99, 133-134, 147, 149, 152).

Beginning with the September 15th payment Kleinschmidt, in addition to paying his own share, made the payments which Baum had agreed to make.

The forfeiture provision is clear and unambiguous and is in form like those not infrequently found in agreements of this type between joint adventurers. That a provision for a forfeiture of this type is valid and binding in the State of California upon the defaulting party was held in *Martin v. Burris*, 57 Cal. App. 739. The pertinent portion of the agreement between the joint adventurers in that case provided as follows (p. 743):

“ ‘That in the event of either of the parties hereto failing to make any payment upon any option or agreement to purchase at the time and place specified

therefor in said agreements or any agreement hereafter to be made in reference thereto, in that event the other party is hereby authorized to make such payment and shall succeed to all the right, title and interest of every kind and character of the delinquent party of in and to the properties named in any of said options which shall have become delinquent by reason of the nonpayment of any installments thereon.' ''

The evidence in the case showed that the defendant failed to pay any part of the installments on one of the mines known as the Red Rock claim. The court in holding that the defendant forfeited his interest in that mine said (p. 743):

“The defendant failed to pay any part of the deferred installments which became due on the Red Rock option and the plaintiff paid \$1,000 on the first deferred installment and made a new arrangement with the owners for subsequent payments. The evidence seems to justify the conclusion that by such failure the defendant forfeited his interest in the Red Rock claim.”

Consequently, we maintain that Baum's interest in the mine itself ceased to exist on his failure to make his payment due on September 15, 1931.

If after that date he had no interest in the mine itself, it is clear that (a) he could not have conveyed any interest in the mine to Kleinschmidt for a person cannot convey that which he does not own, nor (b) could his trustee in bankruptcy have acquired any interest in the property itself either by virtue of a title existing in Baum on the date of his adjudication in bankruptcy, or as a

result of his right under the Bankruptcy Act to set aside conveyances which the bankrupt had made with an intent to hinder, delay or defraud his creditors or to recover the value of the interest which the bankrupt had fraudulently conveyed.

The trustee in bankruptcy when the bankrupt has forfeited his interest in property prior to the adjudication of bankruptcy has no greater interest in it than the bankrupt had, for under such circumstances he stands in the bankrupt's shoes.

Lindeke v. Associates Realty Co. (8th C.C.A.), 146 Fed. 630, was a suit by the lessor of real property against the lessee's trustee in bankruptcy to enforce the lessor's right to forfeit the lease for the breach, prior to the bankruptcy, of the lessee's covenant to build a building on the demised premises. The court held that the forfeiture being valid the lessee lost his interest in the premises and the lessee's trustee in bankruptcy therefore acquired no interest in the premises by virtue of the bankruptcy proceedings. It said (p. 639):

"Under such circumstances, the trustees stand simply in the shoes of the bankrupt at the time they succeeded to the estate. See *York Manufacturing Company v. Cassell et al.*, 201 U.S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Thompson v. Fairbanks*, 196 U.S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Yeatman v. Savings Institution*, 95 U.S. 764, 24 L. Ed. 589; *Hewit v. Berlin Machine Works*, 194 U.S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986."

Odell v. H. Batterman Co. (2d C.C.A.) 223 Fed. 292, considered the effect of a forfeiture in a lease which pro-

vided that in the event of any default under the covenants of the lease the landlord might reenter and remove all persons therefrom. The court in relying upon *Lindeke v. Associates Realty Co.*, supra, said (p. 296):

“A trustee in bankruptcy is bound by all forfeiture clauses, and the bankruptcy court gives effect to them.”

The reason for Baum's default is readily understood when the evidence regarding the circumstances is examined. During the middle of September Baum was heavily indebted, the bank had stopped payment on his checks, and on the 6th of November, 1931, less than three months after the default, he was adjudicated a bankrupt.

In considering the validity of the forfeiture clause in this agreement it must be remembered that the effect of the forfeiture as to Baum's interest in the mine is the same as the effect of the forfeiture as to Sullivan's interest in the mine. Sullivan defaulted in November, 1931 (Tr. p. 99) and on December 13, 1931, he wrote to Kleinschmidt (Tr. p. 101):

“This is to certify that I am unable to meet my prorata payment in re Camp Rock Mines which is due on the 16th instant and that this is your authorization to make said payment in my behalf and in my stead and that upon you making said payment in my behalf I hereby authorize and acknowledge that our agreement between ourselves regarding said failure on my part to meet my quota when due shall automatically grant you a transfer of all my interest in said property subject to reimbursing me in the event of a sale of said mine as per the terms of our said agreement.

Very truly yours,

(Signed) J W Sullivan”.

There has never been any question in this case but that Sullivan forfeited his interest in the mine by reason of his failure to make the December payment. In fact, plaintiff concedes that Sullivan forfeited his interest in the mine by failing to make the payment when he claims for Baum a half interest in the property. Furthermore, the trial court found in finding IX (Tr. p. 49) that prior to the sale of the property by Kleinschmidt to Frank Llewellyn "the interest of J. W. Sullivan had been eliminated." If it is conceded, as it must be, that Sullivan forfeited his interest in the property by reason of failing to make his payment when due, by parity of reason it must also follow that Baum forfeited his interest in the property by his failure to make the payment when due for the forfeiture of the interest of both occurred by reason of the same provision in the same agreement.

- (b) Baum never conveyed any interest in the mine to Kleinschmidt; consequently there was no fraudulent conveyance, the assignment and the quitclaim deed being merely evidence of the forfeiture and an attempt to clear the record title to the mine.**

It was argued below and it will undoubtedly be argued here that the fraud of Baum and Kleinschmidt is shown by the instrument dated September 23, 1931, and denominated an assignment, and the quitclaim deed dated February 29, 1932. Plaintiff argued that Baum by the assignment conveyed his interest in the premises to Kleinschmidt within four months of his adjudication in bankruptcy and reaffirmed this conveyance by the quitclaim deed executed in February of the next year.

But it is clear that Kleinschmidt never received any interest in the premises by virtue of these instruments.

At the time the assignment was executed, Baum had already forfeited his interest by his failure to make the payment due on September 15, 1931. At most it was only evidence of the forfeiture which had already occurred. It was not prepared by the attorney who was acting for Kleinschmidt in matters regarding the mine at that time (Tr. pp. 134, 137-138). It was quite obviously patterned after the assignments which Sullivan originally gave to Baum and Kleinschmidt.

When Kleinschmidt's attorney learned of the existence of this instrument and examined it he thought it was ambiguous (Tr. p. 134):

“I felt that Mr. Kleinschmidt's preparation of this assignment was ambiguous and I advised him it would not clear the title properly and I suggested that Mr. Kleinschmidt make a quitclaim.”

The reason he felt that the assignment was ambiguous is obvious. It provided for the conveyance of a $26\frac{2}{3}\%$ interest in the property, whereas each of the three had a one-third interest in the mine itself, but only a $26\frac{2}{3}\%$ interest in the profits to be derived from the operation or sale of it. The most, therefore, at the time that Baum could convey, was a dry legal title to the property. This was not only his right to do but also his duty. The rule is thus stated in 27 Corpus Juris, pp. 433-434:

“If a debtor holds the bare legal title to property for another and has no beneficial interest therein, it cannot, in the absence of elements of estoppel, be reached and subjected to the payment of his debts, and, therefore, a conveyance thereof by him to the equitable owner, or to a third person at the request

of the equitable owner, is not fraudulent as against his creditors. *Moreover, he not only has the right but is under the legal duty to convey the property to the equitable owner*” (italics ours).

Cases supporting these legal principles are numerous. Typical is *Schreyer v. Scott*, 134 U. S. 405, where the court held that when real property is acquired by a husband in his own name by the use of the separate property of his wife, a subsequent conveyance of the property by the husband to the wife is not a conveyance of which his creditors can complain, as it was but the transfer of the legal title to the equitable owner.

Another typical case is *Martin v. Thomas*, 74 Or. 206, 144 Pac. 684, wherein the court reversed judgment for the plaintiff in a suit to set aside an alleged fraudulent conveyance. The suit was brought by a creditor of Lillie E. Kletzing and the court found (p. 688):

“The evidence shows that Ralph H. Kletzing paid in money and assets belonging to him the \$1,100 when the written contract for the purchase of lot 9 of block 10 of Scott’s addition to Eugene was executed, and that he made thereafter the monthly payments that were made, and that Lillie E. Kletzing never paid anything toward the purchase price of said property, and both parties understood that the beneficial interest in said property was in him and not in his mother. We conclude that prior to the making of the said quitclaim deed and the assignment of said contract to Ralph H. Kletzing, his mother was a naked trustee of said property, and that the whole beneficial interest therein was vested in her son Ralph. As Lillie E. Kletzing was only a naked trustee of said real prop-

erty for the benefit of her son Ralph, who was the sole beneficial owner thereof, it could not have been reached by her creditors and subjected to the payment of her debts while she so held it.”

In *Williams v. Levy* (9th C.C.A.), 54 F. (2d) 18, this court considered an order of a referee in bankruptcy that certain real property standing of record in the bankrupt's name be sold as property of the bankrupt's estate. One Levy produced a deed from the bankrupt which the referee found was not merely a fraudulent conveyance but a forgery. The evidence was undisputed, however, that Levy and not the bankrupt had paid for the property and the bankrupt had only bare legal title. In affirming the district court's order reversing the order of the referee, this court said (p. 19):

“The case as made by the facts is one where the bankrupt, prior to bankruptcy, took the naked legal title to property, the whole ownership of which was in appellee, with the duty upon demand of appellee to transfer the same to him. It would be strange indeed if in such a situation, where bankruptcy has intervened, the trustee of the title holder's estate could, by securing an order of a referee to that effect, wipe out all of the property rights of the owner in the land. There is not a finding, as made by the referee, which can justify the order which was reviewed by the district judge. No situation was presented or claimed as that where the purchaser of property has had title taken in the name of another person, and has knowingly allowed such person to obtain credit upon the representation that he was the true owner thereof. Neither are the rights of any innocent transferees involved. The case is so plain as that a mere statement

of the undisputed facts answers every argument of the trustee. * * * The referee seems to have been influenced by the fact, which he found upon conflicting evidence, that the deed which appellee produced, and which purported to convey the lot from the bankrupt to the appellee, was not genuine and that the bankrupt had not signed it. But what possible difference could that fact make in the determination of the right of appellee to have the lot, which was by all the evidence admittedly his, reserved to him?"

In the case now before the court, Baum contributed only \$1,666.65 of the \$21,800 purchase price of the mine. Such interest in the property as Baum may have been entitled to by reason of this contribution, and it was certainly not an undivided one-half interest, he forfeited by his failure to share with his co-contractors the burden of the purchase contract. After his forfeiture all Baum had was the naked record title to an undivided one-third interest by reason of the recording of the agreement of April 24, 1931. That instrument provided that as a condition to being reimbursed for money advanced out of profits of the mine the defaulting party should execute and deliver "a good and sufficient deed conveying said property * * * to the other two parties" (Tr. p. 85).

It is submitted that whether the assignment and quitclaim deed given by Baum to Kleinschmidt were valid, invalid, void, voidable, fraudulent or forged is of no importance here. As this court said in the *Williams* case "what possible difference could that fact make" when the property was by all the evidence admittedly Kleinschmidt's. It is further submitted that if for any reason such assignment and quitclaim deed are invalid or insuf-

ficient, it is the legal duty of Baum and his trustee in bankruptcy to execute a good and sufficient deed to appellant under the agreement of April 24, 1931, and under the authorities above cited.

II.

THE ONLY RIGHT REMAINING TO BAUM AFTER HIS DEFAULT AND FORFEITURE OF SEPTEMBER 15, 1931, WAS THE RIGHT TO BE REIMBURSED UPON CERTAIN CONDITIONS FOR THE MONEY HE HAD ADVANCED AND HIS TRUSTEE IN BANKRUPTCY CAN RECOVER NO MORE THAN SUCH A SUM, TO WIT, \$2,200.

ASSIGNMENT OF ERRORS.

IX. The District Court erred in denying the motion of this defendant to dismiss the bill of complaint as against her on the ground that the same was not supported and was contrary to the evidence adduced herein, to the denial of which motion timely exception was noted by said defendant.

X. The District Court erred in making said decree and judgment in the amount of \$10,880 instead of the sum of \$2,200.

The forfeiture provision in the agreement of April 24, 1931, quoted under paragraph I (a) of this argument, provided that after default and forfeiture:

“* * * in the event of sale of said Camp Rock Placer Mine, said defaulting party shall be paid at the rate of twenty six and two-thirds ($26\frac{2}{3}$) per cent of the payment made under said sale until he has received an amount equal to the amount of money which he has supplied under this agreement.”

This provision to pay out of proceeds did not reserve to or give Baum any interest in the mining property (*Miller v. Lerdo Land Co.*, 186 Cal. 1, 6).

Baum testified that he realized he had a conditional right under this provision to recover his contributions, but he did not include it in his schedule of assets because the possibility of realizing anything at the time seemed so remote he thought the right valueless (Tr. pp. 148-149). That he did or did not include the right in his schedule or why he did not is not the concern of this appellant. Neither the assignment of September 23, 1931 (Def't. Ex. "B"), the quitclaim deed of February 29, 1932 (Plff. Ex. 11), nor any other conveyance, oral or written, proved at the trial, purport to convey or release this right to Kleinschmidt.

The undisputed evidence at the trial was that Baum contributed five payments of \$333.33 or \$1,666.65 and no more before or after adjudication in bankruptcy. Baum, and hence the plaintiff, is, under any theory, entitled to no more than \$1,666.65.³

Even admitting that by some arrangement not shown by the evidence, Baum did convey this right to Kleinschmidt, and fraudulently, Baum's trustee in bankruptcy can recover from this defendant no more than said sum of \$1,666.65.

3. Assignment of Error X (Tr. p. 184) states the district court erred in making the decree in the amount of \$10,880 instead of the sum of \$2,200. The latter figure was used by counsel when the assignment of errors was prepared due to the fact that at the time of the preparation of the assignment of errors the reporter's transcript had not been completed, and counsel could not find out the exact amount of Baum's contributions. The amount of \$2,200 was therefore inserted in the assignment of errors instead of \$1,666.65.

In *Ackerman v. Merle*, 137 Cal. 169, 69 Pac. 983, an action to set aside fraudulent conveyances, the California court held (p. 171):

“The creditors were entitled to subject to the payment of their claims only the property fraudulently conveyed. * * * Their [creditors’] rights in the property are not enlarged or extended by the fraudulent transfer. They can get nothing for the mere sake of punishing the fraudulent grantee, and are entitled in equity only to have such interest in the property applied to the satisfaction of their claims as has been fraudulently conveyed away.”

To like effect is *Abbey v. Zimmerman*, 12 Cal. App. (2d) 311, 55 P. (2d) 903.

It should be noted that Baum’s right to reimbursement was only a contingent right at the date of his adjudication. Fully ripened, the right entitled Baum or his successor to no more than \$1,666.65, and the conditions upon which it did ripen did not occur until after his adjudication. Even limiting the plaintiff’s recovery to this sum is to give him full benefit of any increase in the value of the right by reason of facts occurring subsequent to the adjudication.

III.

THE COURT'S FINDINGS THAT KLEINSCHMIDT DELIVERED TO BAUM THE INSTRUMENT DATED NOVEMBER 15, 1932, BY WHICH HE AGREED TO PAY BAUM \$10,880 OUT OF THE PROCEEDS OF THE SALE OF CAMP ROCK PLACER MINE, PURSUANT TO AN AGREEMENT TO DEFRAUD BAUM'S CREDITORS AND TO RETURN TO BAUM HIS INTEREST IN THE MINE, ARE NOT SUPPORTED BY THE EVIDENCE; THE EVIDENCE SHOWED THIS INSTRUMENT WAS DELIVERED IN CONSIDERATION OF SERVICES RENDERED BY BAUM AFTER HIS ADJUDICATION IN BANKRUPTCY.

ASSIGNMENT OF ERRORS.

IV. The District Court erred in the making of the following findings of fact which were adopted by it in the making of its decree and judgment, to wit:

(e) “ * * * * *

The court finds that on the 15th day of November, 1932, Walter Granger Kleinschmidt made, executed and delivered to B. F. Baum an assignment in writing wherein and whereby said Walter Granger Kleinschmidt agreed to pay to Benjamin F. Baum fifty per cent of the amount of moneys received by him from the sale or lease of the Camp Rock Mining properties. The court finds that Walter Granger Kleinschmidt received a total of Forty-nine Thousand Dollars from the sale of said Camp Rock Mining properties. The court finds that the said conveyance and assignment was made by Walter Granger Kleinschmidt after Benjamin F. Baum had obtained his discharge in bankruptcy from this court in the matter of the bankruptcy proceedings of Benjamin F. Baum and after he had freed himself from the obligations to his, Benjamin F. Baum's creditors, and the said conveyance was made in compliance with, pursuant to and in accordance with the

original agreement made between Walter Granger Kleinschmidt and Benjamin F. Baum respecting the return to Benjamin F. Baum of his interests in the Camp Rock Mining property.”

(f) “ * * * * *

That the amount agreed to be paid, therefore, by Walter Granger Kleinschmidt to B. F. Baum is one-half of Twenty-one Thousand, Seven Hundred Sixty Dollars (\$21,760.00), or the sum of \$10,880.00.

The court finds that none of said sum has been paid by Walter Granger Kleinschmidt, nor by the Estate of Walter Granger Kleinschmidt, nor by Margaret D. Kleinschmidt as Administratrix of the estate of Walter Granger Kleinschmidt, to the plaintiff, nor to the Estate of Benjamin F. Baum, a bankrupt, and all thereof is due, owing and unpaid, and that there exist no credits, nor offsets, to which the defendants or any of them are or ought to be entitled.”

IX. The District Court erred in denying the motion of this defendant to dismiss the bill of complaint as against her on the ground that the same was not supported and was contrary to the evidence adduced herein, to the denial of which motion timely exception was noted by said defendant.

(a) **The court’s finding that the instrument of November 15, 1932, was delivered pursuant to an agreement to return to Baum his interest in the mine is contradicted by the only evidence on the point.**

As early as July, 1931, within three months of the time Baum, Kleinschmidt and Sullivan first became interested

in Camp Rock Placer Mine, Baum attempted to find purchasers of the mine so the property might be resold to the profit of the joint adventurers (Tr. p. 152).

When the parties first entered into the joint venture in April, 1931, Kleinschmidt was auditor for the Southern California Telephone Company and was employed and resided in Los Angeles, where all the dealings with regard to the mine and the facts disclosed by the evidence at the trial took place. In May, 1931, Kleinschmidt was transferred to San Francisco where he thereafter served as treasurer of The Pacific Telephone and Telegraph Company. When he left Los Angeles he asked Baum to look after his interest in the mine (Tr. p. 151).

After Baum had defaulted on September 15, 1931, in his contract with Kleinschmidt and Sullivan, and had forfeited his interest in the mine and in the venture, except for his right to be reimbursed out of profits of resale, he continued with his efforts to sell the mine. He told Kleinschmidt he wanted \$5,000 cash in payment for his services if he obtained a cash buyer for the mine. Kleinschmidt said he would make a satisfactory agreement compensating Baum but no definite agreement was then made (Tr. pp. 156-157).

Three months after Baum had defaulted, Sullivan likewise defaulted and forfeited his interest in the mine. This left Kleinschmidt alone to carry the burden of the purchase contract, and he alone had to advance \$1,000 each month to prevent forfeiture of the property and the investment already made. This was more than Kleinschmidt had originally bargained for and he was naturally hard pressed. On at least two occasions he had to arrange

loans to meet the payments (Tr. p. 132). Even before Sullivan's default, in November, 1931, when he was advancing but two thirds of the \$1,000 payments, Kleinschmidt told Baum the mine would have to be resold or it would be lost (Tr. p. 160).

Finally in May, 1932, after several tentative sales agreements arranged by Baum had fallen through, Kleinschmidt concluded a contract to resell the mine to one Llewellyn, a purchaser obtained by Baum (Tr. pp. 102-107). The sale price was \$49,000, paid \$1,000 upon execution of the agreement and the balance in certain monthly installments of a minimum of \$1,000. The first payments by Llewellyn had to be used by Kleinschmidt to meet the \$1,000 monthly payments he was required to make to the original mine owners. Although Baum had saved Kleinschmidt's investment by obtaining a purchaser, and although Baum, having been stripped of assets by the bankruptcy proceeding, was in need of money, it was not then possible for Kleinschmidt to pay Baum the \$5,000 commission he had requested except out of his own funds which at that time appear to have been depleted.

Six months later, on November 15, 1932, Kleinschmidt came to Los Angeles and gave Baum, in lieu of cash, an instrument by which he granted and assigned to Baum fifty per cent of the money to be received from the resale of the mine after certain payments and deductions. The court found that under this instrument Kleinschmidt had agreed to pay to Baum one-half of \$21,760, or the sum of \$10,880 (Tr. p. 45). The court also found that this sum represented the proceeds of Baum's interest in the mine, an interest fraudulently conveyed to Kleinschmidt, and that the plaintiff, Baum's trustee in bankruptcy, was

entitled to collect the sum from Kleinschmidt's estate. It is submitted that such findings can be supported by only the vaguest assumptions after the rejection of all the evidence in the case on the point.

From the date of his adjudication until the sale of the mine Baum had been engaged in an effort to obtain a purchaser. During this period Baum also performed other minor services in connection with the mine. After all this, Kleinschmidt in effect agreed to pay Baum \$10,880. The instrument itself (Tr. pp. 68-69) recites only a formal consideration, and in some respects is not entirely clear as to the intention. Baum testified this instrument was executed and delivered to him to compensate him for services rendered Kleinschmidt in looking after his interest in the mine and obtaining a purchaser, services rendered after Baum's adjudication in bankruptcy. Baum's testimony was the only direct evidence on the consideration for the instrument. Kleinschmidt, being deceased, is, of course, not now available to explain his actions. If Baum's testimony is rejected there is practically no testimony interpreting these transactions.

In *Schreyer v. Scott*, 134 U. S. 405, an action like this to recover for alleged fraudulent conveyances, and where, as here, there was the testimony of but one witness to interpret the transactions, the supreme court said (p. 416):

“It is objected by the appellees that Schreyer's testimony is not to be depended upon, because contradictory, confused and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent after the conveyances, were deposited by Schreyer in his own name in bank, and

were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands. But does all this indicate fraud? *If his testimony is worthless and to be rejected, then there is practically no testimony interpreting those transactions, and the court never presumes fraud.* The very confusion and carelessness in the dealings between husband and wife make against rather than in favor of the claim of fraud'' (italics ours).

- (b) There is not only no evidence of fraud in this case but the facts shown by the evidence are consistent only with a course of lawful, fair and honest dealing.

The only circumstance shown by the evidence which was somewhat unusual was the size of the compensation Kleinschmidt agreed, by delivery of the instrument dated November 15, 1932 (Plff. Ex. 12), to pay Baum, i. e., the sum of \$10,880 found by the court. As already noted, Baum testified the instrument was given for services rendered Kleinschmidt after his adjudication and especially for obtaining a purchaser of the mine. His is the only testimony interpreting these transactions.

We believe the rule to be well settled that where the facts proved are consistent with an honest intent, the proof of fraud is wanting.

In *Foster v. M'Alister* (8th C.C.A., 1902), 114 Fed. 145, it is said (p. 153):

“The transaction between the plaintiffs and Terrell & Co. which is assailed was perfectly consistent with honesty and good intentions, and, in the absence of proof to the contrary, the law presumes it was of that character. Mere suspicion, unsupported by evidence, cannot be allowed to deprive a creditor of his legal

rights; and fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated,—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the proof of fraud is wanting. *Bank v. Frank*, 63 Ark. 16, 37 S.W. 400, 58 Am. St. Rep. 65; *Shultz v. Hoagland*, 85 N.Y. 464.”

If \$10,880 is too much to pay for selling mining property worth \$50,000, can it be inferred therefrom that Kleinschmidt was anything but generous? Kleinschmidt is not here to say why he agreed to pay that sum. Possibly he had in mind the fact that if Baum had not obtained a purchaser when he did, he, Kleinschmidt, might have lost everything he had invested because of his inability to meet the monthly installments alone. Possibly he had in mind the fact that Baum had asked for \$5,000 cash for arranging the sale, but because the purchaser was not a cash purchaser and Kleinschmidt’s own funds were depleted, he could not pay what Baum asked, although Baum was in urgent need of money. Instead he promised to pay twice as much in installments at a future date. Possibly he had in mind the fact that Baum, his business associate and friend, had recently lost all his property through bankruptcy proceedings.

If we are to reject the testimony of Baum, and determine this case wholly upon inference and assumptions, upon what theory can the judgment herein be supported? If the instrument of November 15, 1932, was not given to

Baum for selling the mine and otherwise looking after Kleinschmidt's interest while he was away in another part of the state, for what was it given? Did Kleinschmidt pay \$10,880 for the quitclaim deed of February 27, 1932, or the assignment of September 23, 1931, when Baum was legally bound to execute a good and sufficient deed to clear title to the property? Did Kleinschmidt agree to pay \$10,880 out of the proceeds of the mine, so he would not have to pay \$1,666.65 out of the proceeds of the mine in reimbursing Baum for the money advanced? Did Kleinschmidt agree to pay Baum \$10,880 to default by refraining from advancing more money on the purchase contract when Baum was on the verge of bankruptcy and so that he, Kleinschmidt, could meet the payments alone, although he himself was hard pressed financially? All of these propositions assume that Baum's services in selling the mine, rendered after his adjudication in bankruptcy, were of no value and that Kleinschmidt agreed to pay Baum \$10,880 for nothing.

It is submitted that the only logical explanation of the acts of the parties is that given by Baum in his testimony at the trial. It is further submitted that even if Baum had not been available to interpret these transactions, the same conclusion would have to be reached. Baum's explanation is the only explanation which can logically be deduced from the acts themselves and is the only explanation consistent with probability and common sense.

Generosity today may be a suspicious circumstance, but is it alone sufficient to support a finding of fraud when the acts shown by the evidence are, as the court said in the *Foster* case, "legal in themselves and consistent with an honest purpose"?

- (c) Baum's trustee in bankruptcy is not entitled to Baum's earnings after his adjudication in bankruptcy nor the compensation Kleinschmidt agreed to pay Baum for services rendered after Baum's adjudication in bankruptcy.

By delivery to Baum of the instrument dated November 15, 1932, Kleinschmidt agreed to pay Baum for services he rendered Kleinschmidt for looking after his, Kleinschmidt's, interest and in obtaining a purchaser for the mine. All of the services were rendered by Baum after his adjudication in bankruptcy, and Baum's trustee in bankruptcy is entitled to no part of the compensation Kleinschmidt agreed to pay for such services.

Remington on Bankruptcy, Volume 4, says:

“§ 1395. *Property Acquired by Bankrupt after Adjudication.*—Property acquired after adjudication does not pass to the trustee at all, but belongs to the debtor's new estate, and is subject only to the claim of new creditors.”

To the same effect is 7 Corpus Juris, page 132.

In *Progressive Building & Loan Co. v. Hall* (4th C.C.A., 1914), 220 Fed. 45, the court held (p. 48):

“* * * wages earned subsequent to the adjudication cannot be treated as part of the bankrupt's estate.”

In *Equitable Life Assur. Soc. of The United States v. Stewart* (W.D. S.C., 1935), 12 F. Supp. 186, it was held that a trustee in bankruptcy was not entitled to salary of a bankrupt which was not closely related to services prior to bankruptcy but was closely related to services rendered since adjudication and to future services, and dependent upon contingencies for its existence.

Even where a contract for services is entered into before adjudication, if the services are not rendered until after

adjudication in bankruptcy, the compensation earned is no part of the bankrupt estate (*In re Seiffert* (D. C. Mont., 1926), 18 F. (2d) 444).

CONCLUSION.

It is respectfully submitted that the judgment and decree of the district court should be reversed by reason of the insufficiency of the evidence to support the findings necessary to establish a fraudulent conveyance, and that the district court be directed to enter a judgment and decree in favor of this appellant, or that the judgment and decree of the district court should be reversed and the district court directed to enter a judgment and decree in favor of the plaintiff and appellee for a sum not in excess of \$2,200.

Dated, San Francisco,
October 20, 1937.

Respectfully submitted,

ALFRED SUTRO,
FELIX T. SMITH,
JOHN A. SUTRO,
SAMUEL L. WRIGHT,
CHARLES F. PRAEL,
Solicitors for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Kleinschmidt,
Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, a Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

RUPERT B. TURNBULL,
Title Ins. Bldg., 433 S. Spring St., Los Angeles,
Solicitor for Appellee.

FILED

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No. 8662.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Kleinschmidt,
Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bankruptcy
of the Estate of B. F. Baum, a Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

This is a suit by the trustee in bankruptcy of Benjamin F. Baum, bankrupt (after reopening of the bankruptcy proceeding), to collect the value of an interest in property transferred after bankruptcy by the bankrupt Baum to Walter Kleinschmidt.

The conveyance complained of by the plaintiff, trustee, in this action, is NOT only the assignment prior to bankruptcy, but the conveyance which was a deed of property made by the bankrupt subsequent to his adjudication in bankruptcy. The complaint in this action pleaded a conveyance *subsequent* to bankruptcy.

The trial court found that the bankrupt, at the date of his bankruptcy, was an owner of an interest in the property known as the Camp Rock Mine, and found that the bankrupt had attempted to convey it unknown to the trustee and unknown to the court *after* bankruptcy. That conveyance was in form of deed signed by the bankrupt, which appears on pages 65 and 66 of Transcript of Record and which is recorded in San Bernardino County. It is Exhibit 11. The evidence showed that Baum actively concealed his interest in that property, and it was not scheduled. That Baum did not disclose to the Referee in Bankruptcy, or to his trustee, or to his creditors after bankruptcy, the existence of his interest, but attempted to convey that interest by deed to Kleinschmidt during the administration of his bankruptcy estate. Baum's schedules showed his debts in excess of \$90,000.00 and his assets were less than one thousand, to-wit \$588.24 [Tr. p. 81.]

The evidence shows that Kleinschmidt knew of the bankruptcy proceeding of Baum, and that four days after the bankrupt Baum's discharge in bankruptcy a sale of the property was made by Baum for \$50,000.00 in cash, of which, after the payment of \$21,800.00 and other expenses, there remained \$21,760.00. That under the terms of a written agreement between the bankrupt Baum and Kleinschmidt this was to be divided equally, \$10,880.00 to Baum and the same amount to Kleinschmidt. This agreement, Pltf. Ex. 12, reads:

"San Francisco, California
November 15, 1932

"In consideration of one dollar (\$1.00) and other good and valuable consideration, I, the undersigned, W. G. Kleinschmidt, hereby grant and assign to B. F. Baum fifty per cent (50%) of any and all amounts

of money received by me from the sale or lease of the Camp Rock Placer Mine situated in San Bernardino County, California, after having deducted, when payable, from such amounts of money certain sums due Frank J. Murray, J. W. Sullivan and certain other parties mentioned in that certain agreement between W. G. Kleinschmidt, B. F. Baum and J. W. Sullivan, dated the twenty-fourth (24th) day of April, 1931. The said Camp Rock Placer Mine is now held under sale contract by Frank Llewellyn and there is due, as of November 15, 1932, from said Frank Llewellyn, under said sale contract, thirty-nine thousand two hundred dollars (\$39,200.).

W. K. Kleinschmidt"

[Tr. p. 68]

It was and is contended by the trustee in bankruptcy that there can be no *bona fide* holder of a bankrupt's property transferred after adjudication, that a title taken by a trustee in bankruptcy includes the title to property fraudulently conveyed prior to bankruptcy, and that Kleinschmidt, the grantee under the deed, became a resulting trustee.

The evidence showed, without contradiction, that the property was sold for \$50,000.00, and the court gave judgment for the trustee for \$10,880.00, being one-half of the amounts received by Kleinschmidt after the payment of the sums required to be paid under the Plaintiff's Exhibit 12 [Tr. p. 68]. From this judgment Baum does not appeal. This appeal is perfected by the administratrix of the estate of Walter Kleinschmidt, now deceased.

Summary of Argument.

I.

The conveyance complained of by the plaintiff in this action was the deeding of property by the bankrupt subsequent to adjudication and not only the fraudulent assignment prior to adjudication as contended for by the appellant herein.

(a) The trustee in bankruptcy pleaded a conveyance subsequent to bankruptcy, Baum grantor to Walter Kleinschmidt.

(b) The trial court found the conveyance was one made by the bankrupt subsequent to bankruptcy; Kleinschmidt became a resulting trustee.

II.

There can be no *bona fide* holder of a bankrupt's property after adjudication.

III.

Title taken by a trustee in bankruptcy includes title to property fraudulently conveyed prior to bankruptcy.

(a) Kleinschmidt knew Baum was in bankruptcy.

IV.

The trial court was asked to believe that fifty per cent was the percentage to be paid by Kleinschmidt to Baum as a real estate commission for services and to a man "who had no real estate license and could not legally render such services." The trial court did not believe it.

V.

The facts shown by the evidence are consistent only with a course of concealment, deceit and dishonest dealing on the part of Baum and Kleinschmidt.

ARGUMENT.

I.

The Conveyance Complained of by the Plaintiff in This Action Was the Deeding of Property by the Bankrupt Subsequent to Adjudication and Not Only the Fraudulent Assignment Prior to Adjudication as Contended for by the Appellant Herein.

- (a) THE TRUSTEE IN BANKRUPTCY PLEADED A CONVEYANCE SUBSEQUENT TO BANKRUPTCY, BAUM GRANTOR TO WALTER KLEINSCHMIDT.
- (b) THE TRIAL COURT FOUND THE CONVEYANCE WAS ONE MADE BY THE BANKRUPT SUBSEQUENT TO BANKRUPTCY; KLEINSCHMIDT BECAME A RESULTING TRUSTEE.

The allegation in the plaintiff's bill in equity relates to a conveyance made subsequent to bankruptcy, not prior, as claimed for in appellant's brief.

The allegation reads:

“This is a suit in equity brought under sections 70 and 70-E of the Bankruptcy Act of the United States of 1898 and Amendments thereto, to set aside and void transfers of property consisting of the interest of the bankrupt in and to certain mining properties hereinafter described which property was transferred by the bankrupt to Walter Granger Kleinschmidt *subsequent to the filing of the voluntary bankruptcy of Benjamin F. Baum.*” (Italics ours.) [Tr. p. 5.]

The trial court in its findings found:

“That at the time of the making of said schedules and the filing thereof on the 6th day of November, 1931, at the time of the making of the decree of adjudication in bankruptcy as to said Benjamin F.

Baum, said Benjamin F. Baum was the owner of an interest in a certain group of mining claims with water rights appertaining thereto, commonly known as the Camp Rock mining property and also as Camp Rock Mines.” [Findings of Fact, p. 37 Tr.]

And in its conclusions :

“The court concludes that the conveyance of September 12, 1931 by Benjamin F. Baum to Walter Granger Kleinschmidt was made in contemplation of bankruptcy, was made without consideration, and was a fraud upon creditors of Benjamin F. Baum. The court concludes that the conveyance made on the 29th day of February, 1932, attempting to convey by deed, Benjamin F. Baum grantor, to Walter Granger Kleinschmidt, grantee, the Camp Rock mining property, was without consideration, was a void act, and the said conveyance did not pass any title to Walter Granger Kleinschmidt, same having been made and executed *after the adjudication of Benjamin F. Baum*, a bankrupt, having been made without the knowledge, without the consent of the court, the Referee in Bankruptcy or the Trustee in Bankruptcy, and without an order of the court or the Referee.” [Tr. p. 50.] (Italics ours.)

The question of whether or not Kleinschmidt was a *bona fide* holder of the property is not seriously involved. There could be no title acquired by Kleinschmidt, and that question, however, is commented upon in another phase of our argument hereafter, and in answer to our adversary's contention that the dealings of Baum and Kleinschmidt were consistent only with fair and honest dealings.

II.

There Can be No Bona Fide Holder of a Bankrupt's Property After Adjudication.

Benjamin F. Baum filed a voluntary petition in bankruptcy at Los Angeles on the 6th day of November, 1931 and was adjudicated a bankrupt on the same day. He scheduled in excess of \$90,000.00 in liabilities. He did not schedule Camp Rock mining properties or make any reference to them.

On the 29th of February, 1932 and while the bankruptcy proceedings were still pending unadministered, Benjamin Baum deeded to Walter G. Kleinschmidt the Camp Rock mining properties in San Bernardino County, California. [See deed p. 65 Tr.] No disclosure was made to the trustee in bankruptcy, referee in bankruptcy or to the creditors of the ownership of the Camp Rock mining properties, nor was any application made to the court or to any person to sell or convey the property.

TITLE TO PROPERTY OF BANKRUPT VESTED IN TRUSTEE.

“Sec. 70—TITLE TO PROPERTY (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, except insofar as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in

patents * * *; (3) powers which he might have exercised for his own benefit * * *; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; * * * Rights of action arising upon contracts * * *

Property was *custodia legis*.

Remington on Bankruptcy, Volume 4, section 1560, says:

“The maxim is repeatedly enunciated in the decisions that the ‘filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction’.”

In the instant case the bankrupt Baum being adjudicated a bankrupt, forthwith on November 6, 1931, the title to all of his property became *custodia legis*.

“The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in *rem* that the estate is regarded as in *custodia legis* from the filing of the petition. It is true that under section 70a of the Act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was ad-

judicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, section 70a, in reciting the property which vests in the trustee, says there shall vest 'property which prior to the filing of the petition, the bankrupt could by any means transfer or which might have been levied upon and sold under judicial process against the bankrupt.' Under section 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if its enforcement would work a preference. Provision is made for the prompt taking possession of the bankrupt's property before adjudication if necessary. (Sec. 69a.) *Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purpose of the act.*" * * * (Acme Harvester Company v. Beakman, 222 U. S. 300, 56 L. Ed. 208, 27 A. B. R. 262.) (Italics ours.)

"But after adjudication, the filing of the petition amounting to constructive notice, there can be no *bona fide* holder." (Page 1181, Collier on Bankruptcy, 12th edition.)

III.

Title Taken by a Trustee in Bankruptcy Includes Title to Property Fraudulently Conveyed Prior to Bankruptcy.

(a) KLEINSCHMIDT KNEW BAUM WAS IN BANKRUPTCY.

It is provided in subdivision 4 of section 70 of the Bankruptcy Act entitled, "Title to Property," that the title is transferred to certain properties including "property transferred by him in fraud of his creditors." And subdivision 5:

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Collier on Bankruptcy, 12th Edition, at p. 1144, says:

"The trustee is vested not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or encumbered by him, and he may assail in their behalf all of such transfers and encumbrances to the same extent as though the bankrupt had not been declared a bankrupt."

Page 1124, *Collier on Bankruptcy*, 12th Edition, commenting further, Collier says:

"It is apparent that this provision applies to all property transferred by the bankrupt in fraud of his creditors."

As is shown elsewhere in this brief, the evidence made to appear before the trial court showed that the bankrupt Baum, owing \$90,000.00, had no property other than \$588.24, other than his interest in the Camp Rock prop-

erty. As we shall show hereafter by the admission against interest of Baum, he had lost all of his property at the time he made the assignment in September just prior to his November bankruptcy.

With respect to the assignment made prior to bankruptcy, the court made the following findings:

“The court finds that at the time of the adjudication of Benjamin F. Baum as a bankrupt on the 6th day of November, 1931, Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12th day of September, 1931, and less than sixty days prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining Property.

“That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum’s, contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum’s, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at

a date in the future and at a time when said Benjamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's creditors. That on September 12, 1931, Benjamin F. Baum made and delivered to Walter Granger Kleinschmidt an instrument purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described." [Tr. pp. 39-40.]

The instrument referred to as the instrument of September 12 is not a deed of the real property and purported only to be an assignment. The court had before it evidence to support the above finding. The court had before it the schedules of the bankrupt showing \$90,000.00 in liabilities of the bankrupt Baum and less than one thousand dollars in assets. [Ex. 2, Tr. p. 59, and Tr. p. 81.] The trial court had before it the admission against interest on the part of Baum in his testimony, as follows:

"The date of the assignment of my interest to Kleinschmidt is the 23rd of September. On that day I was in Los Angeles. I wasn't doing anything at that time; trying to get myself together. I just lost all my money." [Tr. p. 155, testimony of Benjamin Baum.]

The trial court also had the evidence against interest of Mr. Baum that after he made that assignment in 1931, and from the date of that assignment continuously until after he filed his bankruptcy on November 6, 1931, he was exercising dominion over the mining property in question by way of trying to make a sale of it, notwithstanding the present contention that he had disposed of his interest to Kleinschmidt. [Tr. p. 155.]

The trial court had before it the fact that Baum, at the time of his bankruptcy and thereafter, did not disclose in his schedules or otherwise, that he had any interest in this mining property. The trial court had before it the documentary proof of the deed of February 29, 1932 made by Baum to Kleinschmidt *after* the bankruptcy proceeding. The trial court had before it testimony showing that Kleinschmidt had knowledge of, first, the existence of the bankruptcy during the course of the administration, and second, that he had knowledge of the fact that Baum had been a bankrupt when he dealt with him "the second time." [Tr. p. 159.]

The trial court had before it admission against interest of Baum in his cross-examination:

"My bankruptcy schedules were sworn to on November 5th and they are in evidence here. At that time I didn't give a damn for any interest I had in the Camp Rock property and that is what I thought at the time. Five months and four days later, I sold the property for \$50,000 but I didn't get any money." [Tr. p. 153.]

The trial court had before it the documentary evidence that Kleinschmidt in writing had agreed to give Baum "fifty per cent of any and all amounts of money received by me from the sale or lease of the Camp Rock Placer Mine situated in San Bernardino County." [Pltf's. Ex. 12, Tr. p. 68.]

This is some of the evidence, together with all the circumstances before the court, which constitutes the answer to appellant's claim that there was no evidence before the court from which the court could make the finding and conclusion complained of.

IV.

The Trial Court Was Asked to Believe That Fifty Per Cent Was the Percentage to be Paid by Kleinschmidt to Baum as a Real Estate Agent's Commission for Services. A Commission to be Paid to Baum Who Had No Real Estate License and Could Not Legally Render Such Service and Be Paid for It. The Trial Court Did Not Believe It.

Appellant sets up a man of straw, to-wit, the argument III, subdivision (c), contending that Baum's trustee in bankruptcy is not entitled to Baum's earnings after adjudication. No such contention has been made by the trustee in bankruptcy or is now asserted herein. We concede the principle of law, Baum's trustee in bankruptcy is not entitled to Baum's after-acquired property. In the instant case the trial court found that the conveyance made prior to bankruptcy, to-wit, an assignment, was fraudulent and that the conveyance made by deed after Baum's bankruptcy was void. The conveyance resulted only in making Walter Kleinschmidt a resulting trustee. Kleinschmidt's administratrix now attempts to answer by claiming that Kleinschmidt gave 50% of the net on his mining deal to his agent Baum for making the sale. Baum, under the agreement taking \$10,880.00, and Kleinschmidt, who says he was the absolute owner of all the interest, taking an equal amount. From the cross-examination of Mr. Baum we find the following:

“Mr. Kleinschmidt came down here from San Francisco and said to me, ‘I wish you would *act as my agent* in the sale of the Camp Rock property.’ I was looking after his affairs from July on.” [Tr. p. 152.] (Italics ours.)

Under the laws of the State of California as they existed at that time and at all the times mentioned in these proceedings, *agents* who acted in real estate transactions and for the sale of real property and interests therein must be licensed persons. It was made unlawful for any person to act as a real estate agent and to collect money for services so unlawfully engaged in. Act 112, sec. 1, General Laws of California, under the title, "Agents," reads:

"It shall be unlawful for any person * * * or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor."

That Baum did not have a real estate license during any time in 1932 when he says he negotiated for the sale and completed the sale of the mining property, Walter Kleinschmidt seller to Llewellyn buyer, is admitted by his testimony in this case.

"The deal was made with Evans and Llewellyn but I wouldn't take the responsibility of keeping those people together. The fact that Evans dropped out and Llewellyn came back, why, the sale was all I was interested in. I wasn't trying to keep them together. At the time I made the deal and thereafter, at any time in 1932, *I did not have a real estate broker's license*. I couldn't and never collected a real estate commission for making that sale." [Cross-examination Baum, Tr. p. 153.] (Italics ours.)

The trial court was shown the existence of an assignment, Baum to his partner Kleinschmidt, September 12, 1931, made just prior to bankruptcy of Baum. The court was shown a deed, Baum grantor to Walter Kleinschmidt grantee, of the mining properties in San Bernar-

dino County known as Camp Rock Mine, which deed was dated, acknowledged and recorded all *after* the bankruptcy adjudication of Baum, the grantor. The trial court did not believe the specious story told by Baum that after he concealed the property from the court and his creditors, he earned his interest back by rendering services as the agent of the owner, his partner, Kleinschmidt, and that for such services he received the same amount as did Kleinschmidt, the alleged owner of the whole interest. From the findings and judgment of the trial court it will be noted that Baum takes no appeal.

V.

The Facts Shown by the Evidence Are Consistent Only With a Course of Concealment, Deceit and Dishonest Dealing.

Appellant in her opening brief argues that the facts shown are consistent only with fair and honest dealings on the part of Baum and Kleinschmidt. We have heretofore shown by the citations of law that there can be no *bona fide* holding after adjudication of bankrupt, and the question of *bona fides* is immaterial. We are answering therefore at this time only the argument III, subdivision (b) of appellant's brief and her accompanying assertion that there is no evidence of unfair dealing.

Baum was adjudicated a bankrupt November 6, 1931. [Tr. p. 59, Exhibit 1.] On February 29, 1932 he deeded his interest in the Camp Rock mining properties to Kleinschmidt. Baum was discharged as a bankrupt after paying less than one per cent to his \$90,000.00 of creditors, on April 4, 1932. [Tr. p. 81.] Four days later, April 8, he made sale of the Camp Rock mining property for \$50,000.00 in cash.

Benjamin Baum testified in this case that his interest in the Camp Rock mining properties was of no value as of November 6, 1931. With nothing being done at the mine other than assessment work, the interest of Baum became worth \$25,000.00 within four days after his discharge in April of the next year, 1932. This is what the court was asked to believe. The trial court found:

“That no order of court was obtained permitting the conveyance of said property. That Benjamin F. Baum informed Walter Granger Kleinschmidt, during the pendency of his bankruptcy administration, that he was a bankrupt, and the said Walter Granger Kleinschmidt knew, during the period of administration of the estate of Benjamin F. Baum, that Benjamin F. Baum had been adjudicated a bankrupt and that his status was that of a bankrupt.” [Tr. p. 41.]

In support of that finding, the court had among others the testimony against interest of Benjamin Baum, to-wit:

Testimony as given of the bankrupt case before the referee used as impeachment of him in the trial of the instant case:

“I gave the testimony before the Referee in Bankruptcy on February 13, 1936, mentioned on page 23.

“‘Mr. Turnbull: Q When you were going through bankruptcy Kleinschmidt didn’t know anything about it?’

“‘A Oh, yes.’

“‘Q At the time he dealt with you the *second* time, did you tell him you were through bankruptcy then, when you acquired that interest?’

“‘A I told him I had been discharged.’

“ ‘Q You told him at that time you were free to do business?’

“ ‘A Yes. They told me I was free to do business after I filed the bankruptcy.’ ” [Page 159, Tr. of R.]

It should be noted that the “*second time*” refers to the time of the 50 per cent agreement.

It is contended and argued for by appellant that the February 1932 deed of Baum to Kleinschmidt was given only for the purpose of clearing the title. It appears affirmatively that Benjamin Baum was a married man, living with his wife and had been married fifteen (15) years prior to bankruptcy. When Mr. Kleinschmidt’s attorney, Mr. Blanche, prepared the deed which we are so told was to clear the title to it, he did not even request Mrs. Baum’s signature thereto, although he knew Baum was a married man, and the interest of Baum had been acquired during coverture. An examination of this document, plaintiff’s exhibit 11, printed on pages 65 and 66 Transcript of Record, shows the sole signature of Benjamin F. Baum. The testimony of Mr. Blanche, counsel for Mr. Kleinschmidt during his life time, shows: (1) That Mr. Blanche knew at the time he drew that deed that Baum was in bankruptcy.

“I knew that Mr. Baum attained the status of a bankrupt about November 1931, but when that knowledge came to me, I don’t recall. I knew that he executed a quitclaim deed to Mr. Kleinschmidt after his bankruptcy. The document I am referring to is plaintiff’s exhibit 11, and is an instrument dated February 29, 1932. I knew of the recording of the deed which I prepared. At that time my knowledge

was rather indefinite as to the date Mr. Baum had been declared a bankrupt, but it is my opinion now that I then knew that he had previously been adjudicated, or was mixed up in some bankruptcy proceedings. I am familiar with section 70 of the Bankruptcy Act that title to all property of choses in action passes to a trustee in bankruptcy if he is adjudicated if he has any title." [Page 109, Tr. of R.]

and

"Mr. Baum was a married man. I did not have his wife join in the deed because she wasn't on the original deed. This was merely for the purpose of clarification of the record. Frankly, I don't know why I didn't have her sign it. Perhaps it was an oversight. I think it definitely was." [Page 134, Tr. of R.]

and from testimony of Baum:

"My bankruptcy schedules were sworn to on November 5th and they are in evidence here. At that time I didn't give a damn for any interest I had in the Camp Rock property and that is what I thought at the time. Five months and four days later, I sold the property for \$50,000, but I didn't get any money. Eventually \$49,000 was collected by Kleinschmidt." [Page 153, Tr. of R.]

This is the evidence that counsel refers to as showing conduct consistent only with fair and honest dealing: Concealing a property first and failing to schedule it in his sworn schedules; then deeding the property without telling his wife anything about it or getting her signature, after bankruptcy, at which time he said it was of

no value, obtaining no order of Court for the sale, actively concealing it from the Court and from his creditors; obtaining a discharge and four (4) days later selling the property for \$50,000 in cash under an agreement by which he was to obtain fifty (50) per cent of the net proceeds. Thereafter, when brought to task about the situation, claiming it was payment for his services, to-wit:

Fifty (50) per cent commission for acting as a real estate dealer,

admitting that he had no real estate dealer's license, and therefore, under the laws of California, no right to act as agent nor to accept a real estate agent's fee; the knowledge of the transferee, Kleinschmidt, of the existence of the bankruptcy, the acceptance of a deed without the grantee's wife joining. These are the facts which the appellant has the temerity to argue to this court are solely consistent with fair and honest dealings. These are the facts which the trial court had before it and held to the contrary.

Conclusion.

We respectfully, earnestly and confidently submit that the findings and conclusions of the trial court, who heard the evidence, who had the opportunity of observing the demeanor of the witnesses upon the stand and who selected the testimony which he believed and that which he did not believe, are correct. One learned eastern court is quoted as having said, "It will not be presumed that the man upon the bench is dumber than the ordinary man

upon the street.” The presentation of the facts in this case to a man of ordinary understanding with the ordinary conception of right and wrong, could lead only to the conclusion reached by the trial judge.

Honest men who have interests in real property which are valueless do not actively conceal them when they file voluntary bankruptcy, or omit them from their bankruptcy schedules, nor fail to advise the referee and court, and the creditors, of the existence of such valueless property. Bankrupts always schedule valueless property. After bankruptcy honest men do not secretly convey valueless property to their partners who have knowledge of the existence of the bankruptcy proceedings. In the ordinary course of honest business, valueless mining property, without substantial development work does not become valuable in five months and sell for \$50,000.00 in cash. In the ordinary course of business the owner of property does not pay a stranger to the title fifty per cent for making a sale for him of valuable property. Honest men, knowing of the bankruptcy of their partners, do not take titles to property without an order of the court permitting the transfer, and attorneys who are skilled in their profession do not prepare deeds which are not to be and are not signed by married men’s wives when such documents are obtained for the purpose of clearing titles.

Courts were ordained to do justice, and precedents which we follow are but the concentrated wisdom of human experience in times past. We take these precedents because, while our civilization progresses, human na-

ture remains the same, as may be evidenced by the present day reading of the ancient proverbs of Solomon. Obviously the bankrupt put his property located 200 miles from the forum of his creditors' meetings in the name of Kleinschmidt until a few days after his discharge and then contracted to recover his full share. The judgment of the honorable trial court was the only judgment which could be rendered in this matter, and we respectfully submit it should be sustained.

Los Angeles, California, November 1st, 1937.

Respectfully submitted,

RUPERT B. TURNBULL,
Solicitor for Appellee.

No. 8662

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Klein-
schmidt, Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bank-
ruptcy of the Estate of B. F. Baum, a
Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

ALFRED SUTRO,

FELIX T. SMITH,

JOHN A. SUTRO,

SAMUEL L. WRIGHT,

CHARLES F. PRAEL,

Standard Oil Building, San Francisco,

Solicitors for Appellant.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building, San Francisco,

Of Counsel.

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PAUL P. O'BRIEN,
CLERK

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as Administratrix
of the Estate of Walter Granger Klein-
schmidt, Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee in Bank-
ruptcy of the Estate of B. F. Baum, a
Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

SUMMARY OF THE ARGUMENT.

I. Baum forfeited his interest in the Camp Rock Placer Mine prior to any conveyance and prior to his adjudication in bankruptcy.

(a) Appellee neither refutes nor refers to the forfeiture of Baum's interest in the property.

(b) Whether appellee complains of the quitclaim deed after Baum's adjudication or the assignment before adjudication, he complains of the conveyance of a dry legal title, as Baum had no interest in the property.

II. The conduct of Baum and Kleinschmidt as shown by the evidence, including the evidence pointed out in appellee's brief, is consistent only with appellant's contention that Baum had no interest in Camp Rock Placer Mine after September 15, 1931.

(a) Baum's "admissions against interest" are, first, not binding on appellant and, second, refute appellee's claim of a fraudulent conveyance.

(b) There is no evidence that Baum's equitable interest in the property, which interest appellant contends he forfeited, ever exceeded \$1,666.65, the total of his contribution toward the purchase price.

(c) Mere omissions and carelessness in the dealings between the parties do not establish concealment, deceit or dishonesty.

ARGUMENT.

I. BAUM FORFEITED HIS INTEREST IN THE CAMP ROCK PLACER MINE PRIOR TO ANY CONVEYANCE AND PRIOR TO HIS ADJUDICATION IN BANKRUPTCY.

(a) Appellee neither refutes nor refers to the forfeiture of Baum's interest in the property.

In appellee's statement of the case he says (Br. for Appellee, p. 4):

"The trial court found that the bankrupt, at the date of his bankruptcy, was an owner of an interest in the property known as the Camp Rock Mine * * *."

This is the finding which we strenuously contend is unsupported by any evidence and contradictory to the un-

disputed evidence. Appellee points to no evidence in the record supporting the finding. He assumes the correctness of the finding and proceeds with an argument based upon that premise.

Nowhere in either the statement of the case or his argument does appellee refute or refer to the evidence that the bankrupt forfeited his interest in the mine almost two months before his adjudication in bankruptcy. More than half of appellant's argument in her opening brief is devoted to a consideration of the evidence and law on this point (Br. for Appellant, pp. 11-25). Appellee does not refer to it.

The facts as stated in appellant's opening brief (pp. 4-11) are undisputed. It is not disputed that the contract between Sullivan, Kleinschmidt and Baum, the only suggested source of any interest Baum had in the mine, provided that if Baum or any of the other parties failed to supply his portion of the required funds his interest in the mine would be forfeited (Tr., p. 85; Br. for Appellant, p. 5). It is not disputed that Baum failed to supply his portion of the required funds on September 15, 1931 (Tr., pp. 99, 133-134, 147, 149, 152; Br. for Appellant, p. 6), and contributed nothing toward the venture thereafter. Nor does appellee question the settled law as stated in *Martin v. Burris*, 57 Cal. App. 739, 208 Pac. 174 (Br. for Appellant, pp. 16, 17), that under these facts Baum forfeited his interest in the property.

The only important question in this case is, did Baum forfeit his interest in the mine by failing to supply his proportionate share of the required funds on September

15, 1931? Answer this question in the affirmative, as it must be answered upon the record before the court and under the law cited and quoted in appellant's opening brief, and appellee's argument fails.

(b) Whether appellee complains of the quitclaim deed after Baum's adjudication or the assignment before adjudication, he complains of the conveyance of a dry legal title, as Baum had no interest in the property.

Appellee, under part I of his argument (Br. for Appellee, p. 7) states that he pleaded and he now contends the conveyance of which he complains was the deeding of the property by the bankrupt subsequent to his adjudication. In relying upon this conveyance, the appellee not only ignores the evidence of forfeiture which appellant discussed in her opening brief, but Baum's assignment of his interest in the mine on September 23, 1931 (Tr., pp. 94-96), prior to his adjudication. If there was either a forfeiture or a valid assignment, the deed complained of by appellee could do no more than clear the legal title. It is appellant's contention that the evidence clearly shows that neither the assignment nor the quitclaim deed of which appellant complains conveyed more than a dry legal title.

On the undisputed facts under the law Baum forfeited any interest he had in the Camp Rock Placer Mine on September 15, 1931. The assignment of his interest given by Baum to Kleinschmidt before his adjudication was executed and delivered eight days after the forfeiture, on September 23, 1931, and was, under the circumstances, no more than evidence of the forfeiture. The quitclaim deed given by Baum to Kleinschmidt was acknowledged

and executed on April 7, 1932, and was prepared by Kleinschmidt's attorney for the purpose of clearing the legal title and because he thought the assignment ambiguous (Tr., p. 134; Br. for Appellant, p. 21). Both instruments were executed and delivered after Baum had forfeited any beneficial or equitable interest he had in the property. Neither instrument could convey any more than the dry legal title. Such a conveyance is not one of which the plaintiff in this action can complain.

Schreyer v. Scott, 134 U. S. 405;

Martin v. Thomas, 74 Or. 206, 144 Pac. 684;

Williams v. Levy (9th C.C.A.), 54 F. (2d) 18;

27 *Corpus Juris*, pp. 433, 444.

Appellee's contention that there can be no bona fide holder of a bankrupt's property after adjudication (Br. for Appellee, part II, pp. 9-11) is not questioned by appellant. Appellant makes no claim that she is or that Kleinschmidt was a transferee of the bankrupt's property after adjudication, bona fide or otherwise. Appellee's application to this case of the legal proposition stated in part II of his argument is based upon an erroneous premise and an assumption supported by neither evidence nor inference, and in fact, not even explained by argument. At page 10 in his brief appellee says:

“In the instant case the bankrupt Baum being adjudicated a bankrupt, forthwith on November 6, 1931, the title to all of his property became *custodia legis*.”

Appellant does not deny this proposition but there is no evidence whatever that any part of Camp Rock Placer Mine was the property of the bankrupt on November 6,

1931. Baum had no interest in the mining property on this date and had not had any interest in it since September 15, 1931. Kleinschmidt, and Sullivan, who later forfeited his interest in the same manner as Baum had, were on November 6, 1931, the date of Baum's adjudication in bankruptcy, the sole equitable owners of Camp Rock Placer Mine under the purchase contract of April 16, 1931.

As the appellee says on page 18 of his brief, in this case “* * * the question of *bona fides* is immaterial.” By all the evidence the property was Kleinschmidt's and Sullivan's, and after December 15, 1931, Kleinschmidt's alone, and Baum could not fraudulently convey what was not his.

II. THE CONDUCT OF BAUM AND KLEINSCHMIDT AS SHOWN BY THE EVIDENCE, INCLUDING THE EVIDENCE POINTED OUT IN APPELLEE'S BRIEF, IS CONSISTENT ONLY WITH APPELLANT'S CONTENTION THAT BAUM HAD NO INTEREST IN CAMP ROCK PLACER MINE AFTER SEPTEMBER 15, 1931.

- (a) Baum's “admissions against interest” are, first, not binding on appellant and, second, refute appellee's claim of a fraudulent conveyance.

Under part III of appellee's argument, reference is made to so-called “admissions against interest” by Baum. Such admissions, if they have any evidentiary value, are not admissible against appellant (*Nishi v. Inoguchi*, 116 Cal. App. 398, 2 P. (2d) 864). But even if admissible, they could establish nothing. On page 13 of his brief appellee says:

“As we shall show hereafter by the admission against interest of Baum, he had lost all of his property at the time he made the assignment in September just prior to his November bankruptcy.”

To be specific, eight days before he made the assignment in September he had lost all his interest in the Camp Rock Placer Mine by his failure to perform his contract.

Appellee places some importance upon the “admissions against interest” of Baum that his schedules filed in bankruptcy did not disclose that he had any interest in the mining property. The schedules did not disclose that he had any interest in the mining property because he had no interest in the mining property on that date. Appellee’s whole argument proceeds upon the erroneous premise that Baum had an interest in the property at the date of his adjudication in bankruptcy.

If these be admissions against Baum’s interest it does not appear what Baum’s interest may be. They confirm appellant’s theory of the case and refute appellee’s unsupported claim that Baum had an interest in the mine at the date of his adjudication in bankruptcy.

Whether Kleinschmidt knew or did not know of the bankruptcy proceeding, he was at all times after September 15, 1931, entitled to a deed from Baum to clear title to the property. As stated in appellant’s opening brief (pp. 24, 25):

“* * * if for any reason such assignment and quit-claim deed are invalid or insufficient, it is the legal duty of Baum and his trustee in bankruptcy to execute

a good and sufficient deed to appellant under the agreement of April 24, 1931, and under the authorities * * *.”

On page 14 of his brief appellee claims as evidence against interest the testimony that Baum “was exercising domain over the mining property in question by way of trying to make a sale of it * * *.” The explanation of this is found in the quotation from the transcript on page 16 of appellee’s brief, wherein Baum testified that he, at Kleinschmidt’s request, acted as Kleinschmidt’s agent in the sale of the mining property.

- (b) There is no evidence that Baum’s equitable interest in the property, which interest appellant contends he forfeited, ever exceeded \$1,666.65, the total of his contribution toward the purchase price.

Appellee’s argument under part V of his brief suffers from the defect which permeates other parts of his argument, and arises from the assumption of an erroneous premise at the outset.

Appellee says (Br. for Appellee, p. 19):

“Benjamin Baum testified in this case that his interest in the Camp Rock mining properties was of no value as of November 6, 1931. With nothing being done at the mine other than assessment work, the interest of Baum became worth \$25,000.00 within four days after his discharge in April of the next year, 1932. This is what the court was asked to believe.”

It was the appellee, and not the appellant or the defendant Baum, who asked the court to believe that “the in-

terest of Baum became worth \$25,000.00 within four days after his discharge.”

The discovery of a willing and able buyer of the mining property at that time established the value of the mine at \$49,000. But the evidence is conclusive, and appellant has consistently contended, that Baum had no interest in the property at that time, nor had he had any interest since September, 1931. Although appellee alleged in his pleading that Baum had a \$25,000 interest in the Camp Rock Placer Mine, no evidence was introduced at the trial to establish the source of that interest. Sullivan contributed \$2,666.65, slightly more than 10 per cent of the purchase price of the mine, and got his money back when the mine was sold. Baum contributed \$1,666.65 (Tr., p. 149), slightly more than 7½ per cent of the purchase price, and his trustee in bankruptcy would have the trial court, and now this court, believe that this contribution entitled him to a \$25,000 interest in the mine. Appellant finds it, as apparently does appellee, unbelievable.

(c) Mere omissions and carelessness in the dealings between the parties do not establish concealment, deceit or dishonesty.

Under part IV of his argument appellee notes that Baum did not have a real estate broker's license. He would have us believe that Baum attempted to conceal valuable assets from the bankruptcy court, and yet would not overlook the requirement of the law that he obtain a license before participating in the sale of another's property. The appellant is not concerned with Baum's omission in this respect. It may explain Baum's action some-

what, however, to note that Baum began his efforts to sell the property as early as July in 1931, two months before the forfeiture occurred and while he still had an interest in the property.

In his brief (pp. 20, 21) appellee notes the failure of Mr. Blanche, counsel for Kleinschmidt during his lifetime, to secure the signature of Baum's wife on the quitclaim deed to Kleinschmidt of February 29, 1932. At the time of this deed the mine was by all the evidence admittedly Kleinschmidt's and Kleinschmidt's alone. He was in the position of the appellee in *Williams v. Levy*, supra (Br. for Appellant, pp. 23-24), wherein this court said:

“* * * what possible difference could that fact [the authenticity of the deed from the bankrupt to the appellee] make in the determination of the right of appellee to have the lot, *which was by all the evidence admittedly his, reserved to him?*” (italics ours).

As the Supreme Court noted in *Schreyer v. Scott*, 134 U. S. 405, 416 (Br. for Appellant, pp. 32, 33), the very confusion and carelessness in the dealings between the parties “make against rather than in favor of the claim of fraud.”

In spite of the alleged fraudulent motive which appellee would have the court infer from the conduct of Baum and Kleinschmidt, they neglected to take the step which would most obviously further their supposed sinister purpose. It is a step as obvious to appellee as it would have been to Baum and Kleinschmidt, if they

had had such a purpose, for he mistakenly accuses them of it in concluding his argument.

Appellee says in his brief (p. 24):

“Obviously the bankrupt put his property located 200 miles from the forum of his creditors’ meetings in the name of Kleinschmidt until a few days after his discharge * * *.”

The fact is, as shown by the transcript of record, that although Baum forfeited his interest in September, 1931, a 33 $\frac{1}{3}$ per cent interest in the Camp Rock Placer Mine stood in the name of Baum upon the public records from August 28, 1931, more than two months before his adjudication in bankruptcy, until September 15, 1932, more than eight months after his discharge (Tr., pp. 62-64, 67-69).

CONCLUSION.

The record before the court shows conclusively, without contradictory evidence, that Baum forfeited any interest he had in the Camp Rock Placer Mine before his adjudication in bankruptcy and before any of the alleged fraudulent conveyances. The finding of the trial court that Baum was the owner of an interest in the Camp Rock Placer Mine on the date of his adjudication in bankruptcy is without the support of any evidence. There is likewise no evidence to support the finding of the trial court that appellant’s predecessor in interest received any of the bankrupt’s property after his adjudication, nor is there evidence of fraud or a conspiracy of any kind.

It is respectfully submitted that the judgment and decree of the district court should be reversed by reason of the insufficiency of the evidence to support the findings.

Dated, San Francisco,
November 12, 1937.

Respectfully submitted,

ALFRED SUTRO,

FELIX T. SMITH,

JOHN A. SUTRO,

SAMUEL L. WRIGHT,

CHARLES F. PRAEL,

Solicitors for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

In the
United States
Circuit Court of Appeals
for the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as
Administratrix of the Estate of Walter
Granger Kleinschmidt, Deceased,

Appellant,

vs.

ERNEST U. SCHROETER, as Trustee
in Bankruptcy of the Estate of B. F.
Baum, a Bankrupt,

Appellee.

Petition for Rehearing

FILED

FEB 10 1938

PAUL P. O'BRIEN,
CLERK

RUPERT B. TURNBULL,
Title Insurance Building,
433 South Spring Street,
Los Angeles, California,
Solicitor for Appellee.

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**CERTIFICATE OF GOOD FAITH BY COUNSEL
PRESENTING PETITION FOR REHEARING**

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS
COUNTY OF LOS ANGELES)

I, Rupert B. Turnbull, the solicitor for the appellee, Ernest U. Schroeter, Trustee in Bankruptcy, hereby certify that the within petition for rehearing presented and filed on behalf of the appellee, trustee in bankruptcy, in my judgment is well founded in fact and in law; that said petition for rehearing is not interposed for delay. That said petition is filed for the purpose of calling attention of this court to reasons why the decision in this matter is not correct.

RUPERT B. TURNBULL,

*Solicitor for Appellee, Ernest U. Schroeter,
Trustee in Bankruptcy of the Estate of
Benjamin F. Baum.*

In the
United States
Circuit Court of Appeals
for the Ninth Circuit

MARGARET D. KLEINSCHMIDT, as
Administratrix of the Estate of Walter
Granger Kleinschmidt, Deceased,
Appellant,

vs.

ERNEST U. SCHROETER, as Trustee
in Bankruptcy of the Estate of B. F.
Baum, a Bankrupt,
Appellee.

No. 8662

Petition for Rehearing

To the Honorable Chief Justice and the Associate Justices of the United States Circuit Court of Appeals for the Ninth Circuit, and to Justices Garrecht, Mathews and Haney, Circuit Judges Thereof:

The appellee files this his petition for a rehearing for the purpose of calling to the attention of this court the several ways in which he sincerely believes this court has reached an erroneous decision, to-wit, in its

decree severely modifying the original judgment obtained in the lower court in favor of this appellee, and as his grounds and reasons therefor hereby states:

GROUND FOR THIS PETITION

I.

That from a reading of the opinion of this court deciding this matter it appears that the court has not at all considered the allegations of fraud, the findings of fraud by the trial court, the conclusions of fraud found by the trial court, as the basis of the action and the recovery as decreed by the trial court.

II.

That this court has not considered that a person hopelessly insolvent, owing in excess of \$90,000, and with property other than that fraudulently conveyed worth less than \$1,000, cannot make an agreement, express or implied, to abandon his interest in property, even though it be a contract to purchase, under the terms of which agreement to abandon, either express or implied, it is arranged that he is to have the return of his interest in the contract after he is discharged from bankruptcy, and thus deprive his creditors of an asset which they might have saved.

III.

That the trustee in bankruptcy becomes the owner of property not only which the bankrupt had at the

date of adjudication but which, according to the language of Section 70-A of the Bankruptcy Act includes

“property transferred by him in fraud of his creditors”

and

“property which prior to the filing of the petition he could by any means have transferred.”

IV.

That the court has not taken into consideration that the fraudulent abandonment of the executory contract to purchase the Camp Rock Mine and the agreement between the parties to abandon it temporarily, occurred within the inhibited four months' period, prior to bankruptcy.

V.

That the court has overlooked and not taken into consideration the fact that fraud is always a question of fact and that the facts have been found by the lower court. That the trial court saw and observed the parties and chose to disbelieve the witness Baum, whose testimony this court now uses as a basis for the reversal of the trial court.

ARGUMENT

At the time set for oral argument counsel for this appellee was unable, by reason of previous engagements in the District Court, to appear personally and

answer the oral arguments of the appellant, and feeling the matter had been properly covered by briefs, submitted the matter upon the briefs on file. Upon the reading of the learned opinion of this court it is obvious to the appellee and his counsel that the court has entirely overlooked and not considered the situation which was presented in fact and in law to the lower court. The opinion rendered by this court is logical and upon the premises assumed, the reasoning leads incontrovertibly to the conclusion reached by this court in its opinion modifying the decree of the lower court. Our difference of opinion is upon the premises, not the logic, involved. This court assumes that Benjamin F. Baum was an honest man, that his testimony was true and that the court should have believed him, and this court obviously does believe his testimony. The record shows that Benjamin F. Baum, the bankrupt, owed in excess of \$90,000 and had no assets other than property which produced less than \$1,000 in the bankruptcy court. The Findings show that Benjamin F. Baum, the bankrupt, knowing this, permitted the default and also assigned the only other asset he had to his partner, Kleinschmidt, within 60 days before his voluntary bankruptcy. That he received his interest in that contract back from his partner Kleinschmidt four days after he was granted a discharge in bankruptcy and sold the property for \$50,000, all cash. This court assumes that those two transactions were honest, that they were fair. This court indulges in that assumption as a premise for its logical reasoning to the conclusion

now reached. This court indulges in that assumption of fair dealing, honesty of purpose, notwithstanding the finding of the lower court that the rights of Baum in the joint adventure contract were found to have been given by Baum to Kleinschmidt as a sham and for the purpose of concealing them from the creditors of Baum until he should have obtained his discharge. This was a finding of fact which is contained in the transcript of record, page 39, and reads:

“Benjamin F. Baum scheduled debts in excess of \$90,000.00, and that in contemplation of said bankruptcy proceedings, which were voluntary on the part of Benjamin F. Baum, he did, on the 12th day of September, 1931, and less than sixty days prior to the filing of his bankruptcy on November 6, 1931, and while he was indebted to creditors in a sum in excess of \$90,000.00, he, the said Benjamin F. Baum, entered into an agreement with Walter Granger Kleinschmidt, who was then a person jointly interested with him in the said mining property hereinbefore described, the Camp Rock Mining Property.

“That at said time it was agreed by and between the said Benjamin F. Baum and said Walter Granger Kleinschmidt that Benjamin F. Baum should assign his interest in and to said mining property and his, Benjamin F. Baum’s, contractual rights therein and thereto, and convey the same to Walter Granger Kleinschmidt. That Walter Granger Kleinschmidt agreed that he would hold the same as the property of Benjamin F. Baum, to

and until such time as Benjamin F. Baum should be free of entanglements and obligations of his, the said Benjamin F. Baum's, creditors. That said Walter Granger Kleinschmidt then and there agreed to reconvey said property at a date in the future and at a time when said Benjamin F. Baum should request the same, and at a time when and after Benjamin F. Baum should be free of and from the obligations of his, Benjamin F. Baum's creditors. That on September 12, 1931, Benjamin F. Baum made and delivered to Walter Granger Kleinschmidt an instrument purporting to assign to Kleinschmidt his interest in the mining property hereinbefore described.

“The court finds that thereafter proceedings for the administration of Benjamin F. Baum as a bankrupt were had, that Benjamin F. Baum did not disclose to the trustee in bankruptcy in his estate, to-wit, Ernest U. Schroeter, nor to the Referee in Bankruptcy before whom the bankruptcy proceeding was pending, nor to the creditors of Benjamin F. Baum, that Benjamin F. Baum had an interest or had had any interest in and to the said Camp Rock mining property hereinbefore described, or any contractual or other interest therein or thereto.”

The lower court then proceeds to find, and does find, that THAT VERY AGREEMENT WAS CONSUMMATED and that four days after the discharge of Baum he got a reconveyance from his partner Kleinschmidt. The trial court had before it Benjamin

Baum; he observed the utter impeachment of the man on the witness stand, he observed his demeanor and he found that the story which he told was untrue. Surely this court cannot be so naive as to believe that a man owing \$90,000 would take his one substantial asset, allow it to be forfeited a few days before his bankruptcy, get it back from his partner four days after his discharge in bankruptcy without consideration and sell it for a profit of \$21,000, and then believe that the conveyances were innocent. This court in its opinion disposes of this fraud matter by saying in its opinion:

“Kleinschmidt, on November 15, 1932, assigned to Baum a one-half interest in his profits from the sale of Camp Rock Mine. This assignment was of no interest or concern to appellee.”

The trial court found it was the consummation of the agreement to secrete.

It is no answer to say that the transfer of the rights of Baum were by operation of law rather than by his voluntary written assignment. That is merely calling the acts of Baum names. The fact is obvious, and was so found by the trial court, that the alleged default and the transfer to complete it made by Baum shortly before bankruptcy was a part of a scheme to take that Camp Rock property beyond the reach of Baum's creditors. That it was kept beyond the reach of Baum's creditors with the knowledge on the part of Kleinschmidt that Baum had gone into bankruptcy and it was not given back to Baum until four days after he

was discharged. The record shows conclusively that there was no legal consideration for the transfer back to him four days after his discharge. There is presented in this case in fact a crude attempt by two partners to save one partner's interest until after he should obtain his discharge in bankruptcy. Under the findings of the trial court the parties are not permitted to do this because the court found there was a fraud in fact and by the acts of the parties. If the present decision of this court modifying that decree is to stand, then the very fraud of transfer and concealment and retransfer back into the hands of the guilty party is accomplished and upheld. Every fraud may be explained away upon logical grounds if we take as the premise the story of the persons who are parties to the fraud.

Can a debtor, hopelessly insolvent, agree, expressly or impliedly, to abandon to his partner temporarily or for the term of the debtor's bankruptcy, the interest of the bankrupt in a valuable contract or any valuable property, conceal the facts from the bankruptcy court, the trustee and the creditors, and obtain the return of his interest four days after he is discharged and retain it with impunity? This court has given the answer to this query in the affirmative. This court has absolutely ignored the finding of fact made by the trial court based upon the facts; based upon the court's observation of the parties before him, their demeanor on the stand, and the relation of the facts one to the other. That finding is Finding II in the Findings of Fact found in the Transcript of Record in this case,

pages 39 and 40. This court has taken the testimony of Mr. Baum, a witness who was shown to have acted dishonestly in his bankruptcy proceedings and in relation to his creditors and with respect to the very testimony he gave in this proceeding, and has taken that testimony which the trial court did not believe, and this court has used it as the basis of fact to reverse the trial court. We respectfully challenge the right of this court to disregard a finding of fact and the logical conclusion of law following therefrom. Section 1574 of the Civil Code of California reads:

“Section 1574. Actual fraud a question of fact. Actual fraud is always a question of fact.”

Section 1, Subdivision 25, of the Bankruptcy Act reads:

“‘Transfer’ shall include the sale *and every other and different mode of disposing of or parting with property.* . . .”

Section 70-A of the Bankruptcy Act provides that the trustee of the estate of a bankrupt shall be vested by operation of law with

“property transferred by him in fraud of creditors, property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.”

Prior to bankruptcy and within the four months’ period defined in the Bankruptcy Act, Baum did have a substantial interest in his contract for the purchase

of the Camp Rock Mine. Within that four months period prior to bankruptcy he could not have given that property away, he could not have transferred it, and of course he could not have entered into an agreement with the person with whom he was jointly purchasing the property, Mr. Kleinschmidt, to forfeit his rights in it subject to its being given back to him four days after he was discharged in bankruptcy.

The learned opinion in this matter by this court makes no mention in any place, with the element of fraud, with the secret agreement between the parties, either as alleged in the complaint or as found by the court in its Findings of Fact and Conclusions of Law. This court in its opinion dismisses any such theory, proof, findings and conclusions of the trial court by the simple sentence,

“Kleinschmidt on November 15, 1932, assigned to Baum a one-half interest in his profits from the sale of Camp Rock Mine. This assignment was of no interest or concern to appellee.”

THE LAW

12 Cal. Jur. 1059, Sec. 97:

“ . . . The burden shifts to the transferee to establish that the transaction was in good faith and not fraudulent whenever the evidence is sufficient to establish a *prima facie* case of fraud, or the circumstances are such that an inference or statutory presumption of fraud arises.”

McKinney, Trustee in Bankruptcy, v. Wright, 105 Cal. App. 401:

Syl. 3. “In such action, the husband having rendered himself bankrupt by the conveyance to his wife, *the intent will be inferred* that the transfer was made for the purpose of rendering himself insolvent.”

Judson v. Lyford, 84 Cal. 505 (p. 508):

“Nor is it necessary that the grantor should have had any malice against the creditor, or any evil intent to injure him or any actual intent to do a wrong. It is immaterial whether, as a matter of fact, he supposed that he had a perfect right to conceal his property from his creditors. *Concealment of property from one’s creditor is what the law forbids, and the intent so to conceal it is considered fraud*; and it is sufficient so to plead it.”

Benson v. Harriman, 55 Cal. App. 483:

Syl. 3. “Where a transfer renders one insolvent his insolvency is contemplated by the very act of making the transfer.”

Syl. 4. “Intent is immaterial where the transfer is made without consideration and in contemplation of insolvency.”

Syl. 7. “*The existence of an indebtedness at the time of a voluntary conveyance creates at least a prima facie presumption of fraud.*”

12 Cal. Jur. 1018, Sec. 60:

“Prior to the enactment of section 3442 of the Civil Code in 1895, insolvency itself was not suffi-

cient to make a voluntary conveyance void as to creditors. Insolvency was, however, strongly persuasive of an intent to defraud, and while not conclusive as a matter of law, was frequently of sufficient strength, coupled with other facts, to justify a finding of the existence of fraudulent intent.

The amendment of 1895 completely changed this rule. By express provision, a voluntary conveyance made by an insolvent, or by one in contemplation of insolvency, is now *conclusively presumed to be fraudulent as to existing creditors*. The insolvency of the voluntary grantor is conclusive of fraudulent intent, and *no other facts can control, influence or overcome this presumption. The question of an actual intent is immaterial.*”

12 Cal. Jur. 981, Sec. 23:

“By the provision of the national bankruptcy act, the trustee in bankruptcy *may avoid any transfer by the bankrupt which any creditor might have avoided*, and may therefore maintain an action to set aside property conveyed in fraud of such creditors.”

12 Cal. Jur. 1017, Sec. 59:

“The intent to defraud creditors which is necessary to avoid a voluntary conveyance is a question of fact and not a question of law, *except where the transfer is made while insolvent or in contemplation of insolvency*; and no acts are conclusive as a matter of law that such intent exists, though they may be sufficient to justify an inference of its existence. Thus, *an inference of fraud may*

arise from the absence of a valuable consideration when coupled with other suggestive circumstances, such as the fact that the grantor is heavily indebted and had no other property out of which his obligations can be satisfied. . . . Similarly, a voluntary conveyance is evidence of fraud when made by the debtor to prevent his property from being attached, or when made after service upon him of an order to appear and testify as to his property.”

Daniel v. Sisnero, 109 Cal. App. 8:

Syl. 4. “Where said debtor testified that he received no consideration for the deed to his father, and that the conveyance rendered him insolvent, these facts, with the fact, properly found by the trial court, that the property belonged to the debtor and not to his father, sufficiently showed fraud under section 3442 of the Civil Code, and there was no error in finding that the conveyance was made for the purpose of defrauding plaintiff creditor, and to prevent him from collecting his judgment against the debtor.”

Vogel v. Sheridan, 4 Cal. App. (2d) 298—(hearing by Supreme Court denied):

Syl. 3. “Both sections 3439 and 3442 of the Civil Code should be liberally construed to effect their purpose to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach; and it is only in actions maintained under the proviso in said section 3442 that the insolvency of the transferor becomes of controlling

importance, and *in such actions the question of actual intent becomes immaterial.*”

The court said (p. 305):

“It is only in actions maintained under the proviso in section 3442 that the insolvency of the transferor becomes of controlling importance and in such actions, the question of actual intent becomes immaterial. The distinction is pointed out in *Hanscome-James-Winship v. Ainger*, 71 Cal. App. 735 and *Allee v. Shay*, 92 Cal. App. 749. It has been stated that *both sections should be liberally construed to effect their purpose which ‘undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach.’* (*Borgfeldt v. Curry*, 25 Cal. App. 624, 626).”

Southwick v. Moore, 61 Cal. App. 585. (Hearing denied by Supreme Court):

Syl. 2. “Where a husband made a conveyance of the only property he owned to his wife and she withheld the deed from record, the exercise of acts of ownership by the husband subsequent to the execution of the deed with the knowledge of the wife is strongly suggestive of fraudulent intent as to creditors.”

The court said (p. 590):

“We pass to a consideration of the evidence as supporting the finding that the deed was made to hinder, delay, and defraud creditors. If there could be any dispute as to Moore’s insolvency be-

fore the deed was executed there certainly can be no shadow of doubt that by making the conveyance of the only property he owned he became insolvent and that the transfer was made 'in contemplation of insolvency.' . . . Such a transfer is void as to existing creditors. (Sec. 3442, Civ. Code). . . . The continued control of the property after the conveyance is further evidence of fraudulent intent. . . .

As said in *Schell v. Gamble*, 153 Cal. 448, the burden of proof is upon the creditor to establish the fact of the fraudulent intention of the grantor; that burden is, however, sustained where a *prima facie* case is made out. As we have shown in the instant case, the creditor added other evidence to a *prima facie* showing. *Of course, the evidence was circumstantial, but that is usual in such cases.* It is also true that the record contains other testimony, especially that of the appellant, tending to contradict the respondent's proof. It has not been necessary to give this extended consideration, since *it is not the province of an appellate court to weigh and contrast the evidence.*"

12 Cal. Jur., 1059, Sec. 98:

"When the question of fraud is involved great latitude is allowed in the admission of evidence. *Positive proof of fraud can be seldom obtained, for fraud itself is always concealed. It is usually disclosed only by the circumstances of the transaction and its irregularities,* or from the interests of the parties coupled with the injury to innocent persons, *rather than by direct evidence.* So in attacking a conveyance for fraud as to him, a credi-

tor, in proof of the fraudulent intent of the debtor, may offer in evidence *any fact or circumstance which will have a tendency to establish such intent*, such as evidence of the relation existing between the parties and the nature of the transaction, the contemporaneous and *subsequent conduct* of the parties and the grantor's declarations before the conveyance, the existence of the obligation prior to insolvency, want of consideration, and a threat of legal proceedings made against the vendor. *Declarations* of the parties, while admissible under certain circumstances, *are not of as great a probative value as the facts of the transaction themselves.*"

CONCLUSION

We respectfully submit that if the court will consider the findings of the trial court and the evidence in the record which supports them and the circumstances which support them, it will arrive at the same conclusion as did the trial court. If this court continues to assume that Benjamin Baum told the truth, if it continues to take the testimony as entirely true of this discredited party and witness, it will give its stamp of approval to a surreptitious arrangement between the parties Kleinschmidt and Baum which resulted in the loss of the only valuable asset of the bankrupt and it will permit the accomplishment of an actual fraud. We are confident that if the court will consider the decision of the trial court in the light of the facts and that there was a fraud and that the circumstances and evidence show an agreement between the parties to permit a

default, conceal the property until after Baum received his discharge and then to have it reconveyed to him, this court will correct an injustice which would have occurred had the original opinion of this court been permitted to stand.

Respectfully and confidently submitted,

RUPERT B. TURNBULL,

*Solicitor for Appellee Ernest U. Schroeter,
Trustee in Bankruptcy of the Estate of
B. F. Baum.*

No.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
FRED E. KEELER,
a Debtor.

CLARENCE OCHS, GUY A. KELLEY and P. L.
NEWCOMB,
Appellants,

vs.

O. T. GILBANK and HUGO O. ROMBERG, as Com-
mitteemen of the Estate of Fred E. Keeler, a Debtor,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

SEP 15 1937

PAUL P. O'BRIEN,
CLERK

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

FRED E. KEELER,

a Debtor.

CLARENCE OCHS, GUY A. KELLEY and P. L.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors.

For Appellants:

JOHN W. CARRIGAN, Esq.,

510 West Sixth Street,

Los Angeles, California.

For Appellees:

BEN S. HUNTER, Esq.,

458 South Spring Street,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION.

In the Matter of)	
	(	In Bankruptcy—
FRED E. KEELER,	)	No. 23,666-C
	(	CITATION
a Debtor.)	

To O. T. GILBANK and Hugo W. ROMBERG, as
Committeemen of the Estate of FRED E. KEELER,
a Debtor, respondents, and to BEN S. HUNTER,
Esq., their attorney, GREETING:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals for the Ninth
Circuit, to be held at the City of San Francisco, in the
State of California, on the 15th day of September, A. D.
1937, pursuant to Order Allowing Appeal filed August
17th 1937 in the Clerk's Office of the District Court of
the United States, in and for the Southern District of
California, in that certain case entitled IN THE
MATTER OF FRED E. KEELER, a DEBTOR, involv-
ing a controversy regarding the interpretation of a con-
tract, and the Order on the Petition for Review duly made
and entered in this case in Bankruptcy Docket No.
23,666-C, wherein Clarence Ochs, Guy A. Kelley and

P. L. Newcomb are petitioners and appellants, and O. T. Gilbank and Hugo O. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, are respondents and appellees, and you are directed to show cause, if any there is, why the Order in so far as it is rendered against the petitioners and appellants as in the said petition for appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Leon R. Yankwich United States District Judge for the Southern District of California, this 17th day of August, 1937, and of the Independence of the United States, the one hundred and *sixty-first*.

Leon R. Yankwich

U. S. District Judge for the Southern District of
California.

For Judge Cosgrave who is out of the District.

[Endorsed]: Service of the above Citation, and receipt of a copy thereof, together with a copy of the Petition for Appeal, Assignment of Errors and Order Allowing Appeal herein is hereby admitted this 17 day of August, 1937. Ben S. Hunter By Ben S. Hunter Jr, Attorney for Respondents and Appellees. Filed R. S. Zimmerman Clerk 37 min past 4 o'clock Aug 17 1937 P. M. by M. J. Sommer Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BANKRUPTCY DOCKET

Title of Case
CAUSE NO. 23666-C

In the matter of
Fred E. Keeler

Sec. 74 Bkcy.

Referee and Trustee		Attorneys
Referee:	H. L. Dickson	Ben S. Hunter
Trustee:	H. W. Romberg	
Recr.:	O. T. Gilbank	
Committeeman:	“ “	

Date

* * * * *

1937

June 10 Fld. Refs. cert. on review.
“ 15 Fld. Refs. suppl. cert. on review.

“ 18 Fld. not. of hrg. mot. of Clarence Ochs et al to
rev. ret. 6/28/27.

“ 28 Ent. proc. on & ord. submitting petn. of Ochs,
et al to review previous findings & ord. on
briefs to be fld. this date & 5 x 5 thereafter.
Fld. pts. & auths. in supp. petn. for review.

* * * * *

July 19 Ent. ord. denying petn. for rev. of Ochs et al &
confirm. decision of Ref. Excepts. to petnrs.

“ 28 Fld. ord. denying petn. for rev. & confirm.
decision of Ref. with costs against petnrs.

“ 29 Fld. stip. & ord. extend. to 8/20/37 time to
serve & file prop. B/E/.

* * * * *

Aug. 17 Fld. petn. of Clarence Ochs, Guy A. Kelley &
P. L. Newcomb on appeal. Filed citation on
appeal sgd. by Judge Yankwich, ret. 9/15/37.
Fld. assign. of error. Fld. prae. Fld. ord. allow.
appeal & fxg. cost bond \$250. Fld. stip. re flg.
B/E. Fld. propos. B/E. Fld. stip. for costs
on appeal.

[TITLE OF COURT AND CAUSE.]

CERTIFICATE OF REVIEW

This is the Referee's certificate on petition for review made by Clarence Ochs, Guy A. Kelley and P. L. Newcomb. This certificate is made by Hugh L. Dickson, the Referee in Bankruptcy before whom this matter was and is pending.

Said Referee hereby certifies that in the course of proceedings, this being a proceeding under Section 74 of the Bankruptcy Act, O. T. Gilbank and Hugo W. Romberg, the trustees of said estate, who are designated as the Committeemen in the Extension Proposal, as such Committeemen filed a petition for an order to show cause directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, upon which an order to show cause was issued by the undersigned Referee in Bankruptcy, commanding the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb to appear and show cause why they should not be required to account to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a debtor, for the proceeds of 15% of the oil or gas produced and sold by them from a well upon certain lands belonging to the estate and hereinafter more particularly described in the agreement which is the subject matter of this controversy.

That the hearing on said order to show cause came on duly and regularly to be heard upon the 30th day of March, 1937. That the Committeemen were present in person and were represented by their counsel, Ben S. Hunter; the debtor was represented by his counsel, Guy Richards Crump, and Clarence Ochs, Guy A. Kelley and P. L. Newcomb were present in person and were repre-

sented by their counsel, John W. Carrigan. The order was heard upon oral and documentary evidence and after arguments by counsel submitted to the undersigned Referee for his decision, whereupon the said Referee made the order to account, which is the order herein complained of.

The controversy *arised* out of the following facts:

Clarence Ochs, Guy A. Kelley and P. L. Newcomb are the successors in interest of Arthur G. Gage, O. T. Gilbank and Hugo W. Romberg, as the Committeemen of the Estate of Fred E. Keeler, on or about the 6th day of November, 1935, entered into an agreement with Arthur G. Gage, a copy of said agreement being attached to the order to show cause which is Exhibit "A" of this certificate.

Thereafter Arthur G. Gage and then his successors in interest, the petitioners herein, went upon said premises and placed the well described in the foregoing agreement upon production and have been accounting to the Committeemen for 40% of the total production and have retained for their own use and benefit 60% of the total production. By reason thereof and in order to prevent a forfeiture of the property the Committeemen have been obliged to account to the Pacific Electric and the Associated Oil Company for the 25% of the production which belongs to them, which leaves for the estate 15% of the production.

It was the contention of the Committee that the contract covered only the interest of the estate in the property and that therefore the petitioners were only entitled to retain 60% of 75% of the total production of oil and gas. There was some evidence introduced on behalf of the petitioners which tended to show that in the prelimin-

ary negotiations a different construction had been given the agreement than the one now contended for by the Committeemen. Evidence was also introduced on behalf of the petitioners which showed that the Committeemen had accepted as royalty a lesser sum than the amount which they now contend was due them. Your referee decided that the contract was clear and unambiguous and could not be altered by oral testimony.

The findings of the referee were and are that Clarence Ochs, Guy A. Kelley and P. L. Newcomb are the successors in interest of Arthur G. Gage, who upon the 6th day of November, 1935, entered into a contract with O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, for the operation and maintenance of the oil and gas well hereinbefore described, and as such successors in interest of said Arthur G. Gage are in actual possession of said land and premises and are receiving and have received the total proceeds of the oil and gas produced, saved and sold therefrom; that by the terms of said contract the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb are entitled to retain and receive as compensation for the things to be done by them under said contract 60% of 75% of the total net proceeds, namely, 45% of the total net proceeds of said oil and gas, and are obliged to account for the balance of such net proceeds; and that the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb have accounted to O. T. Gilbank and Hugo W. Romberg, as such Committeemen, the petitioners herein, for only 45% of said proceeds and have retained and kept the balance of the proceeds for their own use and benefit. The referee then made the order complained of and so required Clarence Ochs, Guy A. Kelley and P. L. Newcomb to account for and pay

over to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a debtor, the 15% of the proceeds derived from the sale of oil and gas produced by said well and not heretofore accounted for by them.

Attached hereto and made a part hereof are the following exhibits:

(a) The petition for the order to show cause hereinbefore mentioned and which has attached to it as an exhibit the contract which is the subject matter of this review, Exhibit "A";

(b) A copy of the order to show cause issued by your referee upon the filing of said petition, Exhibit "B";

(c) The order complained of, to-wit: the order requiring Clarence Ochs, Guy A. Kelley and P. L. Newcomb to account to the Committeemen of the Estate of Fred E. Keeler, Exhibit "C";

Within the time allowed by law Clarence Ochs, Guy A. Kelley and P. L. Newcomb, filed their petition for review, the original of which is attached hereto and transmitted herewith.

Dated this 9th day of June, 1937.

Hugh L. Dickson
Referee in Bankruptcy.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION.

In the Matter of)	
)	
FRED E. KEELER,	)	No. 23666-C
)	
A Debtor.)	

PETITION FOR ORDER TO SHOW CAUSE IN RE
HUNTINGTON BEACH WELL DIRECTED TO
CLARENCE OCHS, GUY A. KELLEY AND
P. L. NEWCOMB.

TO THE HONORABLE HUGH L. DICKSON,
REFEREE IN BANKRUPTCY:

Come now O. T. Gilbank and Hugo W. Romberg, and
respectfully show:

I.

That they are now, and at all times hereinafter men-
tioned were, the regularly appointed, elected, duly qualified
and acting Committee of the Estate of Fred E. Keeler,
a Debtor, appointed and elected pursuant to the terms
of an Extension Proposal accepted and approved under
the provisions of Section 74 of Chapter 8 of the Bank-
ruptcy Act of the United States of America.

II.

That on or about the 6th day of November, 1935, your
petitioners herein entered into a certain agreement with
Arthur G. Gage, a full, true and correct copy of said

agreement being hereunto annexed, marked Exhibit "A" and hereby made a portion of this petition.

III.

That your petitioners are informed and believe and upon such information and belief allege the fact to be that said agreement and all rights accruing thereunder have been assigned and transferred by said Arthur G. Gage to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, who are now the owners and holders thereof.

IV.

That the Estate of Fred E. Keeler, a Debtor, and your petitioners, as the Committeemen thereof, have never at any time owned more than a 75% interest in the oil and gas produced from the well now located upon the premises described in said contract; that in making and entering into said contract your petitioners did not believe they were contracting, nor did their intend to contract, with reference to any oil or gas produced from said well other than that owned by said estate.

V.

That Clarence Ochs, Guy A. Kelley and P. L. Newcomb claim by virtue of said contract (Exhibit "A" hereof) that they are entitled to 60% of all oil and/or gas produced from said well instead of and in lieu of 60% of 75% of such oil and/or gas, and have retained 60% of the total proceeds of the oil and gas derived from said well, which has necessitated your petitioners' paying to the Pacific Electric Land Company and Associated Oil Company out of the 40% paid to your petitioners the moneys due said companies; that said Clarence Ochs, Guy A. Kelley and P. L. Newcomb claim they have the right so to do by virtue of said agreement (Exhibit "A" hereof).

WHEREFORE, your petitioners pray that upon the reading and filing of this petition an order may be made directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, commanding them, and each of them, to appear at a time and place to be named in said order, then and there to show cause, if any they have, why they should not be required to account to your petitioners for 15% of the oil and/or gas produced by them from said well, being the difference between 60% of the total production of said well and 60% of 75% of the production of said well.

O. T. Gilbank

Hugo W. Romberg

Petitioners

Ben S. Hunter

Attorney for Petitioners.

EXHIBIT "A"

AGREEMENT

THIS AGREEMENT, made and entered into at Los Angeles, California, upon this 6th day of November, 1935, by and between H. W. ROMBERG and O. T. GILBANK, as Committeemen of the Estate of Fred E. Keeler, appointed pursuant to the Extension Proposal made, accepted and approved pursuant to Section 74 of the Bankruptcy Act of the United States of America, hereinafter referred to as First Party, and ARTHUR G. GAGE, hereinafter referred to as Second Party,

WITNESSETH:—

WHEREAS, First Party is the owner of the following described real property:

Lots One (1), Three (3), Five (5) and Seven (7), in Block 219 of "Huntington Beach, Seventeenth Street Section", in the City of Huntington Beach, County of Orange, State of California, as per map thereof recorded in Book 4, at page 10, of Miscellaneous Maps, records of said Orange County;

EXCEPTING therefrom an undivided one-fourth of all minerals contained in said real property, including but not limited to oil, gas and other hydrocarbon substances, as reserved in the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935, in the office of the County Recorder of said Orange County;
subject to:

1. Taxes for the fiscal year 1935-1936, a lien;

2. An oil and gas lease entered into on April 3, 1926, by and between Pacific Electric Land Company, a California corporation, as lessor, and E. J. Miley, as lessee, for a term of twenty years, beginning April 3, 1926, and ending April 2, 1946, upon the terms and conditions specified in said lease, which was recorded May 1, 1926, in Book 58, at page 116, of Official Records in the office of the County Recorder of said Orange County.

3. Easements for pipelines, light and power lines, rights of ingress and egress and the right to use so much of the surface of said land as may be necessary for the purpose of entering, taking, saving, storing, removing

and transporting all minerals contained in said property; and conditions and covenants relating to the production and disposition of such minerals, all as reserved, imposed and made in and by the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935'; and

WHEREAS, First Party is the owner of the oil and gas lease hereinabove described in so far as said lease affects the real property hereinbefore described; and

WHEREAS, First Party is the owner of certain machinery and equipment located on said property, including, among other things, a derrick and certain casing which is now in the well upon said property (condition of said personal property and the extent thereof being known to Second Party); and

WHEREAS, there is now upon the land and premises above described an oil well, which said oil well has not been operated for a period of more than a year, and will in the opinion of the parties to this agreement require certain labor and expense before the same can be placed upon production:

NOW, THEREFORE, in consideration of the premises, the parties hereto have agreed and do hereby agree as follows:

1. Second Party agrees that he will immediately and within a period of not to exceed five (5) days from date hereof, enter upon the land and premises hereinabove described, and at his own cost and expense and in a workmanlike manner do all things that may be necessary in order to place said well upon production, furnishing there-

for, and at his own expense, such tools and equipment as may be necessary to place said well upon production and to operate the same.

2. It is further agreed that upon said well being placed upon production, Second Party will operate the same for the purpose of making a test, and in a proper manner, for a period of thirty (30) days, during which time Second Party shall furnish to First Party daily run sheets showing the amount of oil produced and the foreign substances therein contained.

3. Upon the expiration of said thirty-day period said Second Party shall have the right and option, upon a five (5) days' notice to First Party, to either remove from said well and said property all tools and equipment placed by him thereon, or to continue to operate said well so long as the same shall produce oil and/or gas in commercial quantities.

4. In the event said Second Party shall elect to continue to operate said well he shall do so in a workmanlike manner and at his own cost and expense, but shall be entitled to receive and retain sixty per cent (60%) of the net proceeds of all oil and gas produced, saved and sold from said premises.

5. It shall further be the duty of said Second Party, at the option of First Party, to deliver said First Party's forty per cent (40%) royalty in kind (said option, however, not to be exercised oftener than once every six months); or said Second Party shall sell and dispose of First Party's oil and gas together with his own but in the name of said First party, and the moneys derived

from the sale of First Party's oil and gas shall be paid by the purchasing company directly to said First Party.

6. Said Second Party shall promptly pay all bills for labor and/or materials furnished on or used in connection with the operation of said well, and the failure so to do shall entitle First Party to cancel this agreement by giving Second Party a ten (10) days' notice in writing of its election so to do.

7. Said First Party shall have the right at all times to keep posted upon said premises a notice in writing stating that it will not be responsible for any labor or materials furnished to Second Party.

8. Upon the placing of said well upon production by Second Party, or at any time thereafter, First Party shall have the right to sell any materials, tools or equipment owned by it and on said premises which are not necessary to the proper operation and maintenance of said well.

9. In the event that Second Party shall not elect to continue to operate said well, as in Paragraph 3 hereof provided, but shall elect on the other hand to remove from said well and said property all tools and equipment placed by him thereon, then and in that event and before he shall have the right to remove any of such tools and equipment, the Second Party shall remove from the well and place in the derrick upon said property all tubing and rods belonging to First Party and used by him, and he shall also repair and restore to the condition that it

is now in all other machinery, tools and equipment owned by First Party and used by Second Party.

10. The rights and privileges herein granted by First Party to Second Party do not include the exclusive right to use the property hereinbefore described, and any portion of the same not necessary to the proper operation and maintenance of said oil well may be used or leased by said First Party the same as though this agreement had not been entered into; it being expressly understood that it is the intention of First Party, in the event they have an opportunity so to do, to lease said real property to parties other than Second Party for the purpose of having the same drilled for oil, but that such lease if made shall be restricted to the use of said property by said lessees in a manner that will not interfere with the operation and maintenance of said well by said Second Party.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

(SIGNED) H. W. ROMBERG

and

O. T. GILBANK

Committeemen of the Estate of
Fred E. Keeler, a Debtor

First Party

(SIGNED) ARTHUR G. GAGE

Second Party.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION.

IN THE MATTER OF)	
	(
FRED E. KEELER,	)	No. 23666-C
	(
a Debtor.)	

ORDER TO SHOW CAUSE DIRECTED TO CLAR-
ENCE OCHS, GUY A. KELLEY AND P. L.
NEWCOMB RE HUNTINGTON BEACH WELL.

Upon reading the verified petition of O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, under the provisions of Section 74 of the Bankruptcy Act of the United States of America, on file herein, and good cause appearing therefrom:

IT IS ORDERED that CLARENCE OCHS, GUY A. KELLEY and P. L. NEWCOMB appear before the undersigned Referee in Bankruptcy upon the 30th day of March, 1937, at the hour of ten o'clock a. m., at Room 613 H. W. Hellman Building, 354 South Spring Street, Los Angeles, California, then and there to show cause,

if any they have, why they should not be required to account to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, for the proceeds of 15% of the oil and/or gas produced and sold by them from the well upon the land described in Exhibit "A" of the petition on file herein.

IT IS FURTHER ORDERED that a copy of said petition attached to a copy of this order be served on Clarence Ochs, Guy A. Kelley and P. L. Newcomb at least five days prior to the hearing on this order to show cause.

IT IS FURTHER ORDERED that this order to show cause need not be served by the United States Marshal but may be served by any citizen of the United States over the age of eighteen years.

Done in open Court this 16th day of March, 1937.

Hugh L. Dickson
REFEREE IN BANKRUPTCY.

EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION.

IN THE MATTER OF)	
)	
FRED E. KEELER,	)	No. 23666-C
)	
a Debtor.)	

ORDER DIRECTING CLARENCE OCHS, GUY A.
KELLEY and P. L. NEWCOMB TO ACCOUNT
RE HUNTINGTON BEACH WELL.

O. T. Gilbank and Hugo W. Romberg, as Committee-
men of the Estate of Fred E. Keeler, a Debtor, having
heretofore filed a petition praying that an order to show
cause be issued directed to Clarence Ochs, Guy A. Kelley
and P. L. Newcomb, requiring them, and each of them,
to show cause, if any they have, why they should not
be required to account to the petitioners for 15% of the
oil and gas produced, saved and sold from that certain
oil and gas well located in Huntington Beach, Orange
County, California, upon those certain lands and premised
more particularly described as follows:

Lots One (1), Three (3), Five (5) and Seven (7),
in Block 219 of "Huntington Beach, Seventeenth Street
Section," in the City of Huntington Beach, County of
Orange, State of California, as per map thereof recorded
in Book 4, at page 10, of Miscellaneous Maps, records
of said Orange County;

EXCEPTING therefrom an undivided one-fourth of
all minerals contained in said real property, including

but not limited to oil, gas and other hydrocarbon substances, as reserved in the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935, in the office of the County Recorder of said Orange County; and

Said order to show cause as prayed for having been issued and service thereof made upon Clarence Ochs, Guy A. Kelley and P. L. Newcomb in the manner and form provided in said order; and

Said order to show cause coming on regularly to be heard upon the 30th day of March, 1937, before the Honorable Hugh L. Dickson, Referee in Bankruptcy, the petitioners, O. T. Gilbank and Hugo W. Romberg, being personally present in Court and represented by their counsel, Ben S. Hunter, the Debtor being represented by his counsel, Buy Richards Crump; and the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb being personally present and represented by their counsel, John W. Carrigan, and

All parties having announced upon the calling of said matter that they were ready for trial, and oral and documentary evidence having been introduced and the cause having been argued by counsel and submitted to the Court for its decision and the Court having fully considered the same, now finds that Clarence Ochs, Guy A. Kelley and P. L. Newcomb are the successors in interest of Arthur G. Gage, who upon the 6th day of November, 1935, entered into a contract with O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, for the operation and maintenance of the oil and gas well hereinbefore described,

and as such successors in interest of said Arthur G. Gage are in actual possession of said land and premises and are receiving and have received the total proceeds of the oil and gas produced, saved and sold therefrom; that by the terms of said contract the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb are entitled to retain and receive as compensation for the things to be done by them under said contract 60% of 75% of the total net proceeds, namely, 45% of the total net proceeds of said oil and gas, and are obliged to account for the balance of such net proceeds; and that the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb have accounted to said O. T. Gilbank and Hugo W. Romberg, as such Committeemen, the petitioners herein, for only 45% of said proceeds and have retained and kept the balance of the proceeds for their own use and benefit; WHEREFORE,

IT IS ORDERED that you, Clarence Ochs. Guy A. Kelley and P. L. Newcomb, do account for and pay over to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, the 15% of the proceeds derived from the sale of oil and gas produced by said well and not heretofore accounted for by you to them.

Done in open Court this day of April, 1937.

Hugh L. Dickson
REFEREE IN BANKRUPTCY

APPROVED AS TO FORM:

Guy Richards Crump
Attorney for Debtor.

John W. Carrigan
Attorney for Clarence Ochs, Guy A. Kelley and
P. L. Newcomb.

[TITLE OF COURT AND CAUSE.]

PETITION TO REVIEW REFEREE'S ORDER.

To the HONORABLE HUGH L. DICKSON, Referee
in Bankruptcy:

The petition of Clarence Ochs, Guy A. Kelley and
P. L. Newcomb, respectfully shows:

I.

That on the 16th day of March, 1937, an Order to Show Cause based upon the petition of the Committeemen of the Estate of Fred E. Keeler, a Debtor, in the above entitled matter, directed your petitioners, to appear before this Court on the 30th day of March, 1937, and to show cause, if any they had, why they should not be required to account to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a debtor, for the proceeds of 15% of the oil and/or gas produced and sold by them from the land described in Exhibit "A" of the petition for order to show cause on file herein;

That the hearing on said order duly and regularly came on for hearing on the 30th day of March, 1937; that your petitioners at said time appeared in person, and by John W. Carrigan, Esq., their attorney; that said Committeemen appeared at said time in person and by Ben S. Hunter, Esq., their attorney; that the Debtor was represented by his counsel, Guy Richards Crump, Esq.;

II.

That thereafter and on the 9th day of April, 1937, this Court made and entered the following order of which your petitioners complain, as hereinafter set forth:

The Referee therefore makes the following order:

“O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, having heretofore filed a petition praying that an order to show cause be issued directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, requiring them and each of them, to show cause, if any they have, why they should not be required to account to the petitioners for 15% of the oil and gas produced, saved and sold from that certain oil and gas well located in Huntington Beach, Orange County, California, upon those certain lands and premises more particularly described as follows:

Lots One (1), Three (3), Five (5) and Seven (7), in Block 219 of ‘Huntington Beach, Seventeenth Street Section,’ in the City of Huntington Beach, County of Orange, State of California, as per map thereof recorded in Book 4, at page 10, of Miscellaneous Maps, records of said Orange County;

EXCEPTING therefrom an undivided one-fourth of all minerals contained in said real property, including but not limited to oil, gas, and other hydrocarbon substances, as reserved in the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935, in office of the County Recorder of said Orange County; and

Said order to show cause as prayed for having been issued and service thereof made upon Clarence Ochs, Guy A. Kelley and P. L. Newcomb in the manner and form provided in said order; and

Said order to show cause coming on regularly to be heard upon the 30th day of March, 1937, before the Honorable Hugh L. Dickson, Referee in Bankruptcy; the petitioners, O. T. Gilbank and Hugo W. Romberg being personally present in Court and represented by their counsel, Ben S. Hunter; the Debtor being represented by his counsel, Guy Richards Crump; and the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb being personally present and represented by their counsel, John W. Carrigan; and

All parties having announced upon the calling of said matter that they were ready for trial, and oral and documentary evidence having been introduced and the cause having been argued by counsel and submitted to the court for its decision and the Court having fully considered the same, now finds that Clarence Ochs, Guy A. Kelley and P. L. Newcomb are the successors in interest of Arthur G. Gage, who upon the 6th day of November, 1935, entered into a contract with O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, for the operation and maintenance of the oil and gas well hereinbefore described, and as such successors in interest of said Arthur G. Gage are in actual possession of said land and premises and are receiving and have received the total proceeds of the oil and gas produced, saved and sold therefrom; that by the terms of said contract the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb are entitled to retain and receive as compensation for the things to be done by them under said contract 60% of 75% of the total net proceeds, namely, 45% of the total net proceeds of said oil and gas, and are obliged to account for the balance of such net proceeds; and that the said Clarence Ochs,

Guy A. Kelley and P. L. Newcomb have accounted to said O. T. Gilbank and Hugo W. Romberg, as such Committeemen, the petitioners herein, for only 45% of said proceeds and have retained and kept the balance of the proceeds for their own use and benefit: WHEREFORE,

IT IS ORDERED that you, Clarence Ochs, Guy A. Kelley and P. L. Newcomb, do account for and pay over to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, the 15% of the proceeds derived from the sale of oil and gas produced by said well and not heretofore accounted for by you to them.

Done in open Court this 9th day of April, 1937.

HUGH L. DICKSON,
REFEREE IN BANKRUPTCY."

III.

That said order was and is erroneous in that it is not supported by the findings of fact and/or conclusions of law, and that it is based upon findings of fact and conclusions of law which are not supported by the evidence adduced at said hearing or by law; that the findings of fact upon which said order is based, and which are not supported by the evidence presented at said hearing and which do not support the said order are as follows:

"* * * * * that Clarence Ochs, Guy A. Kelley and P. L. Newcomb are the successors in interest of Arthur G. Gage, who upon the 6th day of November, 1935, entered into a contract with O. T. Gilbank and Hugo W. Romber, as Committeemen of the Estate of Fred E. Keeler, for the operation and maintenance of the

oil and gas well hereinbefore described, and as such successors in interest of said Arthur G. Gage are in actual possession of said land and premises and are receiving and have received the total proceeds of the oil and gas produced, saved and sold therefrom; that by the terms of said contract the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb are entitled to retain and receive as compensation for the things to be done by them under said contract 60% of 75% of the total net proceeds, namely, 45% of the total net proceeds of said oil and gas, and are obliged to account for the balance of such net proceeds; and that the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb have accounted to said O. T. Gilbank and Hugho W. Romberg, as such Committeemen, the petitioners herein, for only 45% of said proceeds and have retained and kept the balance of the proceeds for their own use and benefit;”

IV.

That there was no evidence adduced at said hearing to sustain that part of the findings which reads as follows:

“* * * * * that by the terms of said contract the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb are entitled to retain and receive as compensation for the things to be done by them under said contract 60% of 75% of the total net proceeds, namely, 45% of the total net proceeds of said oil and gas, and are obliged to account for the balance of such net proceeds: and that the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb have accounted to said O. T. Gilbank and Hugo W. Romberg, as such Committeemen, the petitioners herein, for only 45% of said proceeds and have retained and kept the balance of the proceeds for their own use and benefit;”

V.

That the evidence adduced at said hearing conclusively shows that your petitioners are entitled to receive 60% of 100% of the net proceeds of all gas and oil produced, as provided for in paragraph four of said Agreement, which reads as follows, to-wit:

“In the event said Second Party shall elect to continue to operate said well he shall do so in a workmanlike manner and at his own cost and expense, but shall be entitled to receive and retain sixty per cent (60%) of the net proceeds of all oil and gas produced, saved and sold from said premises.”

VI.

THE TESTIMONY INTRODUCED AT THE HEARING DOES NOT SUPPORT THE FINDINGS.

Arthur G. Gage, upon direct examination, testified as follows: (Page 8 of transcript, Line 24).

“A. * * * * * The other parties had given up the well and had found that it had 300 barrels of water to pump, instead of about 50-50. I said, in talking to Mr. Gilbank, that I was still interested in the proposition, but not in the former—because of the excessive water, and that I couldn’t produce the property unless I got 60 per cent of the oil on the premises. He then sent me over to Mr. Hunter to have a contract drawn, and this contract was drawn as it is here, at that time. In the course of a few weeks I had disposed of the property and notified the purchasing agent to not pay any royalties to

anybody, and the man or men that I had sold to happened to come in and negotiated and talked to them about it. I went with Holoday to Mr. Hunter's office and told him that Mr. Gilbank had said we had drawn a poor contract, that it was ambiguous, and Mr. Hunter said it wasn't ambiguous, but meant that I was to get 60 per cent and the receiver was to get 15 per cent, and the Pacific Electric Land Company 25 per cent."

Page 9, line 20 of Transcript:

"The Referee: Well, have you been receiving 60 per cent of all of the oil produced from that well, you or your assignee?

The Witness: Yes, sir.

The Referee: Did you personally receive any of it?

The Witness: Yes, sir, I did."

Page 11, Line 4 of Transcript:

The Referee: What did you understand this second paragraph 'excepting therefrom an undivided one-fourth of all minerals obtained from said property'?

The Witness: Well, I understood just the same as when a landowner claims one-sixth or an eighth; there was still plenty left to pay me 60 per cent.

The Referee: Twenty-five per cent was going to some person under this clause?

The Witness: I wasn't interested, so long as I got 60 per cent of the whole."

Page 11, Line 17 of Transcript:

CROSS EXAMINATION.

By Mr. Hunter:

Q. Before signing the contract, you submitted it to your attorney for approval, didn't you?

A. No.

Q. Well, didn't you make the statement, in both Mr. Gilbank's and my presence, that you wanted a day or two on it, so you could submit it to your attorney?

A. I may have; I have no recollection of it.

Q. Wasn't there an interval of a couple of days between the time the contract was drawn and the time it was signed?

A. There may have been. I told you I had known you since we were boys together, and that I was relying on you and taking your word more than anybody's.

Q. Isn't it a fact that you made a number of proposals prior to this contract?

A. Yes, sir.

Q. A number of proposals by form letters?

A. Yes, sir.

Q. And isn't it true in each of those proposals, whatever the nature of the proposal was, it provided for the payment to the Pacific Electric Land Company, and then a division?

A. Well, there were several different propositions.

Q. Isn't that a fact, the written proposals—

Mr. Carrigan: The written proposals are the best evidence; I have them here, copies of them.

The Referee: That would be the best evidence."

INTRODUCTION OF RESPONDENT'S EXHIBITS 1, 2 and 4.

Page 13, Line 6 of Transcript:

"Mr. Carrigan: Mr. Gilbank, do you stipulate that Mr. Holoday was in your employ and negotiated at that time with Mr. Gage, isn't it?

Mr. Hunter: That is correct.

Page 13, Line 21 of Transcript:

Q. By Mr. Carrigan: Now, your proposals in both of these letters provided in the inception that you were to receive 66-2/3 of all oil produced; why was that?

A. Those propositions cover an entirely different set of conditions; in one, we were to receive a part of the the operating expenses.”

Page 14, Line 1 of Transcript:

Q. Was that on account of water being in the well?

A. They gave me records that showed there was about 40 barrels of oil and 60 barrels of water, and we were dealing along, making various proposals and counter-proposals, up to the time of the deal with the Superior Oil, without notifying me, and when they blew up they called me in and we made this last one.”

PETITIONERS' EXHIBIT "A" INTRODUCED IN EVIDENCE.

Page 14, Line 21, of Transcript.

Page 15, Line 9 of Transcript:

Q. By Mr. Carrigan: You stated that when you went back to Mr. Hunter, and you told him that Mr. Gilbank was contending the contract should read '60-75', what did Mr. Hunter say in reference to Mr. Gilbank's constructions?

A. He said they were all wet.

Q. He said that Mr. Gilbank was all wet?

A. Yes, that that contract was not ambiguous, and that it meant 60 per cent to the operator, 15 per cent to the Referee, and 25 per cent to the Associated Oil.”

MR. J. E. HOLODAY

upon

DIRECT EXAMINATION,

testified as follows:

Page 18, Line 12, of Transcript:

“Q. Mr. Holoday, were you present with Mr. Gage, after this lease was executed, when he called on Mr. Hunter, the attorney representing Mr. Gilbank?

A. Yes, sir, on about February 26th, 1936, I believe.

Q. Were the terms and conditions of the lease discussed at that time?

A. I think either I asked Mr. Hunter, or Mr. Gage asked Mr. Hunter, if he would interpret this contract, and, as I recall, Mr. Hunter said it was a 60-40 contract, and that out of the 40 per cent 25 per cent would have to be paid to the oil company, which would net 15 to the estate; that is my memory at this late date.”

MR. P. L. NEWCOMB,

on

DIRECT EXAMINATION,

testified as follows: (Page 21, line 6 of Transcript)

“Q. Mr. Newcomb, you are one of the parties ordered to show cause on this date?

A. I am.”

* * * * *

Page 22, line 3 of Transcript:

“The Referee: Yes. Maybe you can tell me—on what basis do your records show you were accountable to Mr. Gilbank?

The Witness: Always on the basis of 60-40.

The Referee: On 60 per cent of the total production?

The Witness: Yes, sir.

The Referee: And not 60 per cent of 75 per cent?

The Witness: Certainly not.

The Referee: When was the first time that Mr. Gilbank and Mr. Romberg made the suggestion to you that you hadn't accounted to them for the oil in accordance with the contract with Mr. Gage?"

The Witness produced letter and fixes the date as of Jan. 15, 1937.

* * * * *

Page 23 of Transcript. The witness testified that the first remittances were made to the Committeemen on October 30, 1936, on the basis of 60-40 per cent of the production.

Page 23, Line 24 of Transcript.

"The Referee: And you didn't hear any protest from Mr. Gilbank or Mr. Romberg, the Committeemen of the Keeler estate, until you received this letter dated January 15, 1937?"

Page 24, Line 1 of the Transcript.

The Witness: That is correct; never anything formal, simply a suggestion, and that letter was written, that we thought placed some conflict on it."

Page 25, Line 1 of Transcript.

The run sheets of the amount of oil produced and the payment of the proceeds on the basis of the 60-40 introduced in evidence.

Page 27, Line 9 of Transcript.

The witness testified that on January 15, 1937, he had a conversation with Mr. Gilbank at the latter's office, and that at that time there was no specific mentioned made of percentages and no question raised regarding it directly. Witness stated that his purpose of going to Mr. Gilbank's office was to make payment of royalties.

Page 28, Line 1 of Transcript.

"Q. Just relate the conversation that took place.

A. The essential part of it was, Mr. Gilbank suggested that possibly we knew we were facing some dispute as to the interpretation we put upon the contract, and that was the first notice I had had from anybody connected with the estate that there was any difference of opinion.

Q. What was said about Mr. Keeler, if anything?

A. Mr. Gilbank indicated that he was perfectly satisfied with the conditions under which the oil had been operated, the performance on our part of the contract, and expressed the opinion that they would not be inclined to take any action against us, but it was anticipated that the estate would in a few months come out of receivership

and enhance the value of some of the estate in receivership, and if that occurred that Mr. Keeler would attack us, that Mr. Keeler was a hard man to deal with and we might anticipate being attacked.

The Referee: On this oil contract?

The Witness: Yes, on our lease. He didn't say for what reason we would be attacked, or on what basis, but that we would be attacked."

* * * * *

Page 29, Line 20, of Transcript.

"Q. Was there anything said about the contract, the way it was drawn up by Mr. Gilbank?

A. Well, the only remark that was direct reference to the contract was Mr. Gilbank's statement that he should have drawn the contract himself."

Page 30, Line 8 of Transcript.

The witness testified that the partnership's gross receipts from the well amounted to \$3361, and that the gross expenditures amounted to \$4398. Included in this latter sum was the royalty paid to the Keeler Estate, royalty charges and equipment.

Page 30, line 18 of Transcript.

Witness testified that in addition to their loss of \$1037, they had invested \$4500., which has not been returned, and that the only offset is that of \$500., to their credit in the bank.

Page 31, Line 18 of Transcript.

“Q. By Mr. Carrigan: Now, what was the condition of the well when you took it over, Mr. Newcomb? I am going to shorten this, if I can.

The Referee: I don't see that that is material at all. All you have before me is the construction of this contract. It doesn't make any difference whether he spent \$90,000 and took out \$9,000,000.

Q. By Mr. Carrigan: Was the money spent on the well necessary for its production?

The Referee. I don't think that is material. I am on the interpretation of this—”

Page 32, Line 20 of Transcript.

The Witness testified that they paid on the same basis as their predecessors in interest had, to-wit: 40-60, and remittances were made by the Dehydrating Company.

- - - - -

CROSS EXAMINATION

By Mr. Hunter.

Page 34, Line 10 of Transcript:

The witness testified that he had no conference with Mr. Holoday before he took over the Gage lease. That he discussed with Mr. Holoday purchasing the estate's interest in the property.

Page 35, Line 12, of Transcript.

The witness testified that he did not recall having had any conversations with Mr. Holoday concerning the dis-

pute between Gage and the estate as to the construction of the contract. The first notice he received about the dispute was from people who were taking the oil called attention to the fact that these letters were in existence. Witness stated that he did not recall Mr. Holoday calling that to his attention.

WHEREFORE, your petitioners being aggrieved because of said order, pray that the same may be reviewed, as provided for in the Acts of Congress relating to Bankruptcy, General Order No. 27, and Rules of this Court No. 84, and that this Court declare and order that said petitioners as the successors in interest of Arthur G. Gage, are entitled to receive 60 per cent of the net proceeds of all oil and gas produced, saved and sold from the premises, and that H. W. Romberg and O. T. Gilbank, as Committeemen of the Estate of Fred E. Keeler, a Debtor, are entitled to receive 15 per cent, and the Pacific Electric Land Company *are* entitled to receive 25 per cent, in accordance with that certain Agreement dated November 6, 1935, entered into by and between H. W. Romberg and O. T. Gilbank, as Committeemen of the Estate of Fred E. Keeler, appointed pursuant to the Extension Proposal made, accepted and approved pursuant to Section 74 of the Bankruptcy Act of the United States of America, and Arthur G. Gage, and for such other relief as to the Court may seem meet and proper.

John W. Carrigan
Attorney for petitioners.

State of California,)
) ss.
 County of Los Angeles,)

John W. Carrigan, being by me first duly sworn, deposes and says that he is the attorney for the Petitioners in the above entitled action; that he has read the foregoing Petition to Review Referee's Order and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

John W. Carrigan

Subscribed and sworn to before me this 16th day of April, 1937.

[Seal]

C. M. Commins

Notary Public in and for the County of
 Los Angeles, State of California.

[Endorsed] Received copy of the within Petition to Review Referee's Order this 16 day of April, 1937. Ben S. Hunter—R. C. Attorney for O. T. Gilbank and Hugo W. Romberg. Guy Richards Crump (H. L.) Attorney for Fred E. Keeler, a Debtor.

Filed Apr 16, 1937 at 30 min. past 1 o'clock P. M.
 Hugh L. Dickson, Referee C. M. Commins, Clerk. C. M. C.

[Endorsed]: Filed R. S. Zimmerman Clerk 52 min.
 past 3:00 o'clock Jun 10 1937 P. M. By M. J. Sommer
 Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

REFEREE'S SUPPLEMENTAL CERTIFICATE ON
REVIEW.

I, HUGH L. DICKSON, one of the Referees in Bankruptcy at Los Angeles, California, hereby submit my Supplemental Certificate on Review:

That through inadvertence, in filing the original certificate dated the 9th day of June, 1937, there was omitted therefrom the reporter's transcript of proceedings on order to show cause, directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, re Huntington Beach well, held on March 30, 1937.

The Referee transmits herewith the following document:

Reporter's transcript on proceedings on Order to Show cause, directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, re Huntington Beach well, Tuesday, March 30, 1937.

DATED at Los Angeles, California, this 11th day of June, 1937.

· Hugh L. Dickson
Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman, Clerk, 53 min. past 3 o'clock Jun 15, 1937 P. M. By F. Betz Deputy Clerk.

At a stated term, to-wit: The February Term A. D. 1937, of the District Court of the United States of America within and for the Southern District of California held at the Court Room thereof, in the City of Los Angeles on Monday, the 19th day of July in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable Geo. Cosgrave District Judge.

In the Matter of	)	In Bankruptcy
	(
FRED E. KEELER,	)	No. 23666-C
	(	MINUTE
Debtor.	)	ORDER.

This cause having come before the Court on June 28, 1937 for hearing on petition and motion of Clarence Ochs, Guy A. Kelley and P. L. Newcomb to review the previous findings and order, pursuant to notice filed June 18, 1937; and having been argued by counsel and submitted on brief filed June 28, 1937 and to be filed 5 x 5, and said briefs having been filed and duly considered by the Court, upon consideration whereof, the Court now orders as follows:

Twenty-five per cent of the oil having been excepted, the parties to the contract never contracted with reference to it. The subject of the contract therefore is seventy-five per cent of the oil produced. (9 Cal. Jur. 322). I find myself compelled therefore to agree with the referee.

The petition for review is denied and decision of the referee confirmed.

Exception to Petitioners.

[TITLE OF COURT AND CAUSE.]

ORDER IN RE PETITION FOR REVIEW FILED
BY CLARENCE OCHS, GUY A. KELLEY AND
P. L. NEWCOMB.

The Petition for Review filed by Clarence Ochs, Guy A. Kelley, and P. L. Newcomb to review the order made by the Honorable Hugh L. Dickson upon the 9th day of April, 1937, came on regularly to be heard before this Court upon Monday, the 28th day of June, 1937, John W. Carrigan appearing in behalf of petitioners and Ben S. Hunter appearing in behalf of O. T. Gilbank and Hugo W. Romberg, the Committeemen of the Estate of Fred E. Keeler, a debtor, and the matter having been argued orally and at the request of the parties submitted on briefs, and briefs having been filed by the respective parties to this proceeding, and the Court having fully considered the oral arguments and the briefs filed and having reviewed the testimony, and it appearing therefrom that the Findings of Fact made by the Honorable Hugh L. Dickson are correct and that his order made pursuant thereto is in accordance with the law;

IT IS ORDERED that said Petition for Review be and the same hereby is denied and the decision rendered herein by the Honorable Hugh L. Dickson be and the same hereby is confirmed.

IT IS FURTHER ORDERED that O. T. Gilbank and Hugo W. Romberg, as the Committeemen of the Estate of Fred E. Keeler, a debtor, recover from said petitioners their costs in this matter expended.

Dated: July 28, 1937.

Geo. Cosgrave
Judge

APPROVED AS TO FORM:

John W. Carrigan
Attorney for Petitioners

Ben S. Hunter
Attorney for Respondents.

[Endorsed]: Decree entered and recorded 7/29/37
R. S. Zimmerman Clerk, By R. B. Clifton Deputy Clerk.

Filed R. S. Zimmerman Clerk 56 min. past 2:00 P. M.
O'clock Jul 28, 1937 By M. R. Winchell Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION.

It is hereby stipulated by and between Ben S. Hunter, Esq., attorney for O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a debtor, and John W. Carrigan, Esq. attorney for Clarence Ochs, Guy A. Kelley and P. L. Newcomb, that the Bill of Exceptions heretofore, on the 10th day of August, 1937, served on attorney for O. T. Gilbank and Hugo W. Romberg and filed with the clerk of the above entitled Court on the 17th day of August, 1937, contains all the material evidence given and proceedings had on the trial of this action, and that the same may be approved, allowed, settled, and ordered filed, and made a part of the record herein by the Judge before whom this cause was tried, upon the filing of this stipulation, without further or other notice to the parties herein or their counsel.

Dated this 16th day of August, 1937.

Ben S. Hunter

Attorney for Committeemen

John W. Carrigan

Attorney for Ochs, Kelley and Newcomb.

[Endorsed]: Filed R. S. Zimmerman, Clerk 51 min.
past 2:00 o'clock Aug 17 1937 P. M. M. J. Sommer
Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ENGROSSED BILL OF EXCEPTIONS BY
PETITIONERS.

BE IT REMEMBERED that heretofore, to-wit: on the 28th day of June, 1937, the petition filed by Clarence Ochs, Guy A. Kelley and P. L. Newcomb, to review the testimony and order made by the Honorable Hugh L. Dickson, Referee in Bankruptcy, on the 9th day of April, 1937, came on regularly to be heard before his Honor, George Cosgrave, sitting as Judge of said Court without a jury;

John W. Carrigan appeared as attorney for Clarence Ochs, Guy A. Kelley and P. L. Newcomb, the petitioners, and Ben S. Hunter appeared as attorney for O. T. Gilbank and Hugo W. Romberg, the Committeemen of the Estate of Fred E. Keeler, a debtor, respondents;

Honorable Hugh L. Dickson having heretofore duly prepared and filed herein his certificate on review and supplemental certificate on review, including therein the reporter's transcript containing the evidence and the proceedings theretofore taken before him, and the matter having been submitted to the Court for decision, the Court on the 28th day of July, 1937, made its order denying said petition for review, and confirmed the decision rendered by the Honorable Hugh L. Dickson, and said order was thereupon on the 28th day of July, 1937, entered;

That on the 16th day of March, 1937, Honorable Hugh L. Dickson, Referee in Bankruptcy issued and served on Clarence Ochs, Guy A. Kelley and P. L. Newcomb, an Order to appear and Show Cause on the 30th day of

March, 1937, at the hour of ten o'clock A. M., at Room 613 H. W. Hellman Building, 354 South Spring Street, Los Angeles, California, why they should not be required to account to O. T. Gilbank and Hugo W. Romberg, as Committeemen of the Estate of Fred E. Keeler, a Debtor, for the proceeds of 15% of the oil and/or gas produced and sold by them from the well upon the land described in Exhibit "A" of the petition on file herein;

Whereupon, on the 30th day of March, 1937, the cause, coming on regularly to be heard before Honorable Hugh L. Dickson, the petitioners offered and introduced the following evidence and exhibits of evidence and objections and motions were made and rulings of said Referee were entered and exceptions taken by petitioners, to-wit:

(Testimony of Arthur Gage)

ARTHUR GAGE

witness called on behalf of petitioners, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Carrigan:

My name is Arthur Gage.

I am the party that entered into this lease with the Committeemen. Before the lease was executed I held conversations over a period of six or eight months with Mr. Holoday. Mr. Holoday is in the Court Room. I negotiated with him in respect to the royalty that should be paid to the estate. I made some written propositions and negotiated back and forth and it dragged along for six or eight months. Then I was called into Mr. Gilbank's office and I found that they had made a deal with

(Testimony of Arthur Gage)

another party without notifying me, and I complained about them treating me that way. The other parties had given up the well and had found that it had 300 barrels of water to pump instead of about 50-50. In talking with Mr. Gilbank I said I was still interested in the proposition, but not in the former proposition—that I could not produce the property unless I got 60 per cent of the oil on the premises.

Mr. Gilbank then sent me over to Mr. Hunter's to have a contract drawn and this contract was drawn as it is here, at that time. In the course of a few weeks I disposed of the property and the men that I had sold to happened to come in and we talked about the lease. I went with Mr. Holoday to Mr. Hunter's office and told him that Mr. Gilbank had said we had drawn a poor contract; that it was ambiguous, and Mr. Hunter said it wasn't ambiguous, but meant that I was to get 60 per cent and the receiver was to get 15 per cent and the Pacific Electric Land Company 25 per cent. Subsequent to that, they had a meeting and called me over and Mr. Hunter informed me at the meeting that on re-reading the contract he changed his mind and meant something else.

Myself and assignees had been receiving 60 per cent of all the oil produced from that well. When the well showed 300 barrels of water, I turned it over to another party, but retained a 10 per cent interest in it. When I went to Mr. Hunter's office I told him that there was a controversy existing between Mr. Gilbank and myself in reference to the interpretation of the contract. My understanding with Mr. Gilbank was that I was to receive 60 per cent of all oil and gas produced. After Mr.

(Testimony of Arthur Gage)

Hunter drew the contract I read and signed it. I read the second paragraph which reads:

“* * * * * excepting therefrom an undivided one-fourth of all minerals obtained from said property.”

I understood it to be just the same as when a landowner claims a one-sixth or an eighth; there was still plenty left to pay me 60 per cent. Twenty-five per cent was going to some person under that clause; I wasn't interested so long as I got 60 per cent of the whole;

CROSS EXAMINATION.

By Mr. Hunter:

Witness testified: Before signing the contract I did not submit it to my attorney for approval. I may have stated that I wanted a day or two so I could submit it to my attorney, but I have no recollection of it. There may have been a couple of days between the time the contract was drawn and the time it was signed. I told you that I had known you since we were boys together; that I was relying on you and taking your word more than anybody's. It is a fact that I made a number of proposals prior to this contract. These proposals were in the form of letters, and they provided for the payment to the Pacific Electric Land Company and then a division. There were several different propositions.

Thereupon witness was handed a copy of a letter he received from Mr. Gilbank and the letter was introduced in evidence.

(Testimony of Arthur Gage)

Mr. Hunter stipulated at that time that Mr. Holoday was in the employ of Mr. Gilbank and Mr. Romberg as an agent and negotiated with Mr. Gage.

Letter received by Mr. Gage from Mr. Holoday dated March 1, 1935, introduced in evidence and marked Petitioners' Exhibit No. 1.

Petitioners' Exhibit No. 2, dated March 4, 1935, introduced in evidence.

DIRECT EXAMINATION.

By Mr. Carrigan:

Witness testified: My proposition in both of these letters provided that I was to receive $66\frac{2}{3}$ of all oil produced, but that was to cover an entirely different set of conditions; we were to receive a part of the operating expenses.

They gave me records that showed that there was about 40 barrels of oil and 60 barrels of water, and we were making various proposals and counter-proposals, when the Committeemen called me in and we made this last one.

By Mr. Hunter:

Witness testified: I remember writing a letter on March 5th, and of Mr. Holoday saying "we have lost our copy", and of making a copy in my office. The copy was made by my son.

(Testimony of Arthur Gage)

Mr. Hunter stated that a copy of this contract is set forth in full in the 5th report and account of the committee; the same was offered for approval by the Referee. Contract was introduced in evidence as Respondents' Exhibit "A".

By Mr. Carrigan:

The witness testified: When I went back to Mr. Hunter and told him what Mr. Gilbank was contending the contract should be read "60-75" he said that Mr. Gilbank was "all wet"—that the contract was not ambiguous; that it meant 60 per cent to the operator, 15 per cent to the Referee, and 25 per cent to the Associated Oil. Mr. Holoday was present with me at that time. He heard the conversation between myself and Mr. Hunter. The contract was drawn in Mr. Hunter's office. I do not remember where I signed it, but I was sent by Mr. Gilbank to Mr. Hunter's office to have the contract drawn.

Exhibit No. 2 of Petitioners is addressed to my son whose name is H. T. Gage. My son was going to take it over, but when he found out about the water he backed out. When the Superior took over the well, instead of finding 60 barrels of oil and 40 of water, they found 300 barrels of water, and those conditions make it harder for anyone to operate at a profit and it requires a greater percentage. It costs just as much to pump water as it does to pump oil. The Superior backed off and left the well. Water weighs eight pounds, 8.335; and oil weighs a little over 6 pounds, depending upon the gravity.

(Testimony of Mr. Holoday)

MR. HOLODAY.

witness called on behalf of the petitioners, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Carrigan:

Witness testified: I was employed by Mr. Gilbank to negotiate a lease on this oil well at Huntington Beach. I had negotiated with Arthur Gage and sometimes in the name of H. T. Gage, his son, but always with Arthur Gage.

In conducting my negotiations, I understood the estate had the right to make the lease subject to the 25 per cent royalty. I did not know who would have to pay it. It had to come out of the oil that came out of the ground on these premises. I was present with Mr. Gage after the lease was executed when he called on Mr. Hunter, the attorney representing Mr. Gilbank. That was on or about February 26, 1936, I believe. The terms and conditions of the lease were discussed. I think either I asked Mr. Hunter, or Mr. Gage asked Mr. Hunter, if he would interpret this contract, and as I recall, Mr. Hunter said it was a 60-40 contract, and that out of the 40 per cent, 25 per cent would have to be paid to the oil company, which would net 15 per cent to the estate. That is my memory at this late date.

(Testimony of Mr. Holoday)

I received instructions in writing on or about November 1st to contact Mr. Gage. I have a copy of those instructions with me. I took them out of the file. Shall I read it? In talking with Mr. Gage I showed him what my instructions were in writing. Mr. Gilbank gave me all my instructions in writing. I could not say that I showed these instructions to Mr. Gage, but I discussed them with him as I was instructed. There may have been discussions as to the cost of putting the well on productions, but there was nothing specifically mentioned as to how much it would cost; no one knows how much an oil well will cost. I did not know that there was water in the well. I didn't discuss the condition of the well with Mr. Gage. I don't think anybody knew what was in that well until they got to operating.

Going back to the conversation with Mr. Hunter and Mr. Gage in Mr. Hunter's office I don't recall Mr. Hunter saying that Mr. Gilbank was "all wet". The conversation was very short at that time, as I recall it, but I do recall, perfectly well, that Mr. Hunter stated that Mr. Gage was to get 60 per cent of all the oil and gas on the premises. It was 60-40, and Mr. Gage would get 60 per cent and the estate 40 per cent, out of which they would have to pay 25 per cent royalty, and have a net of 15 per cent left. It was a short conversation and not drawn out at all. When I say "the estate", I mean the Keeler estate.

(Testimony of P. L. Newcomb)

P. L. NEWCOMB.

witness called on his own behalf and on behalf of his partners, the petitioners herein, after being duly sworn, testified as follows:

By Mr. Carrigan:

I am one of the parties ordered to show cause here on this date. Clarence Ochs and Guy A. Kelley are my partners. We are operating this well. We took over the lease from Mr. Gage. We took over the lease in February or March, 1936. Our records show that we accounted for the royalties on the basis of 60-40—on 60% of the total production, and not 60% of 75%. The first time that Mr. Gilbank and Mr. Romberg made the suggestion to me that I had not accounted to them for the oil in accordance with the contract with Mr. Gage, was at the time I was in Mr. Gilbank's office, and he acknowledged the receipt of certain remittances. That was on January 15, 1937. I had made settlementments with the Committeemen prior to that time. The first settlement occurred on October 30, 1936, and the amount represented 40 per cent.

We began to make remittances in October, 1936, on the basis of 60-40 of production, and we did not hear any protest from Mr. Gilbank or Mr. Romberg, the Committeemen of the Keeler Estate, until we received this letter dated January 15, 1937. That letter only asked for run tickets—the amount received for oil delivered to the Dehydrating Company, the purchaser of the oil. The letter of Jan. 15, 1937, only asked for run tickets. It was on that date that the interpretation of the lease was raised verbally. The sheet of the Dehydrating Com-

(Testimony of P. L. Newcomb)

pany that took this oil, shows how the proceeds were split up. It was dated February, 1936. The run was from January 30th to February 12, 1936, inclusive. Martin and Moore, assignees of Gage 50 per cent, Gage 10 per cent, Romberg and Gilbank, Committeemen for the Keeler Estate, 40 per cent. The total amount was \$182.71 taken in from the well.

The next sheet of the Keeler well was from February 21st to February 29th of that month, \$113.20 was received; disbursements, E. F. Moore 50 per cent, Romberg and Gilbank 40 per cent and H. T. Gage 10 per cent.

The oil from the 25th to the 27th of January, 1936, was \$67.43; disbursements: Martin and Moore 50 per cent, Gage 10 per cent and Romberg and Gilbank, receivers for the Keeler well, 26.97.

The above sheet containing the run of the oil and the disbursements to the respective parties was introduced and received in evidence by the Referee.

Witness testified:

Before we took it over the Dehydrating Company was making disbursements according to the instructions received from the estate. We made the payments direct to the estate, and the Dehydrating Company made a division according to the instructions received from the estate.

On or about January 15, 1937, I had a conversation with Mr. Gilbank at his office, 425 Title Insurance Building. There were no persons other than Mr. Gilbank and myself present. We did not discuss the 40-60 royalty.

(Testimony of P. L. Newcomb)

There was no specific mention made of the percentages at that time and no question raised regarding it directly. I went over to Mr. Gilbank's office to make payment of royalties. Mr. Gilbank suggested that possibly we knew we were facing some dispute as to the interpretation we put upon the contract, and that was the first notice I had had from anybody connected with the estate that there was any difference of opinion. Mr. Gilbank indicated that he was perfectly satisfied with the conditions under which the oil had been operated, the performance of our part of the contract, and expressed the opinion that they would not be inclined to take any action against us, but it was anticipated that the estate would in a few months come out of receivership and enhance the value of some of the estate in receivership, and if that occurred that Mr. Keeler would attack us; that he was a hard man to deal with and we might anticipate being attacked. Mr. Gilbank was referring to the Gage lease. He did not say for what reason we would be attacked or on what basis, but that we would be attacked. The royalties I handed to Mr. Gilbank represented 40 per cent of the proceeds on the sale of oil from that well.

The actual gross receipts were \$3361.00. This amount was received from oil and gas up to March 1, 1937. During that period we paid out \$4398.00. That represents what we paid to the Keeler Estate, the royalty charges and equipment amounting to \$1189.50, making in excess of expenditures \$1037., above what we took out of the well, and in addition to that we invested all our own money in this well \$4500. That has never been returned. We have \$500. in the bank. The partnership has never received any dividends whatsoever. What has

(Testimony of P. L. Newcomb)

been taken out of the well has been put back with the exception of \$600., which we have now to pay bills.

Question by Mr. Carrigan:

Now what was the condition of the well when you took it over, Mr. Newcomb? I am going to shorten this, if I can.

Referee:

I do not see that that is material at all. All you have before me is the construction of this contract. It does not make any difference whether he spent \$90,000 and took out \$9,000,000.

Letters written by Mr. Gilbank to the Dehydrating Company introduced in evidence and ordered filed by the Referee.

Witness testified:

I want to point out that the arrangement under which we continued to pay at the time we took over, was the one that had been established by our predecessors, and that was on the same basis, 40-60, and paid direct by this Dehydrating Company, and that maintained up to the time we found it desirable to sell to some other agency.

Question by Mr. Carrigan:

How long had this well stood idle before Mr. Gage took it over?

Mr. Hunter:

That is objected to as incompetent, irrelevant and immaterial.

(Testimony of P. L. Newcomb)

The Referee:

I don't think that has anything to do with it, Mr. Carrigan. As I understand it, no matter what the condition of the well was, or how long it took to clean it out, or what it was producing, the only question is whether these persons are to get 60 per cent of the whole or 60 per cent of the 75.

CROSS EXAMINATION

BY MR. HUNTER.

Witness testified:

I did not have any conversation with Mr. Holoday prior to the time we took over the Gage lease. I negotiated at one time through Mr. Holoday for the purchase of the estate's interest in the property. That occurred approximately a month or so after I had been interested in the Gage lease. I did not notify the Keeler estate that I had purchased an interest in the Gage lease, unless it was incidentally in conversation about purchasing their interest in the well. It might be that the first notice that the estate had that I had any interest in the lease, was in my talk with Mr. Holoday. I do not recall that Mr. Holoday told me of the dispute between Gage and the estate as to the construction of the contract. The first intimation I recall of it was when the people who were taking the oil called attention to the fact that these letters were in existence. I do not recall Mr. Holoday calling that to my attention.

Due exceptions were taken to the ruling of the Court. included herein all exhibits introduced in evidence before Honorable Hugh L. Dickson, Referee in Bankruptcy.

Thereupon on the 28th day of July, 1937, the time within which to serve and file a bill of exceptions was extended to and including August 20, 1937, by order of the Court upon stipulation of the parties in words and figures as follows:

"IT IS HEREBY STIPULATED AND AGREED by and between counsel for Clarence Ochs, Guy A. Kelley and P. L. Newcomb, the petitioners, and counsel for O. T. Gilbank and Hugo W. Romberg, the Committeemen of the Estate of Fred E. Keeler, a debtor, that subject to the approval and order of the Court, the time within which the petitioners herein may serve and file their proposed Bill of Exceptions herein is extended to and including August 20, 1937.

DATED this 28th day of July, 1937.

(Signed) Ben S. Hunter

Attorney for O. T. Gilbank and Hugo W. Romberg,
the Committeemen of the Estate of Fred E.
Keeler, a debtor,

458 South Spring Street,
Los Angeles, California

(Signed) John W. Carrigan

Attorney for Clarence Ochs, Guy A. Kelley and
P. L. Newcomb, the Petitioners.

510 West Sixth Street,
Los Angeles, California.

IT IS SO ORDERED this 29th day of July, 1937.

Wm. P. James

United States District Judge

Signing in the absence of Judge Cosgrave."

By reason of Rule No. 11 of the United States District Court for this Southern District of California the term of this Court is automatically extended to comprise a period of three calendar months beginning on the first Tuesday of the month in which a judgment is entered for the purpose of making and filing bills of exception and of making any and all motions necessary to be made within the term at which judgment is entered, thus extending the term of this Court in the instant case to October 5, 1937.

Forasmuch as the matters and things above set forth do not fully appear of record, the said petitioners tender and present the foregoing as their bill of exceptions in said cause and pray that the same may be approved, allowed and settled and made a part of the record in this case by this Court, pursuant to the law in such cases.

Which is accordingly done this 17th day of August 1937.

Leon R. Yankwich

Judge of the United States District Court for the
Southern District of California, Central Division.

For Judge Cosgrave who is out of the District

[Endorsed]: Received copy of the within Proposed Bill of Exceptions this 10th day of August, 1937. Ben S. Hunter Attorney for O. T. Gilbank and Hugo W. Rosenberg, Committeemen of the Estate of Fred E. Keeler, a Debtor.

Filed R. S. Zimmerman, Clerk at 52 min. past 2 o'clock Aug. 17, 1937 P. M. By M. J. Sommer, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION.

In the Matter of)	
	(	In Bankruptcy
FRED E. KEELER,	)	No. 23,666-C
	(	PETITION
a Debtor.	)	FOR APPEAL.

TO THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, CENTRAL DIVISION AND
TO HONORABLE GEORGE COSGRAVE,
JUDGE THEREOF:

Your petitioners, Clarence Ochs, Guy A. Kelley and P. L. Newcomb, in the above entitled cause, feeling aggrieved by the order rendered herein and entered on the 28th day of July, 1937, pray that an appeal may be allowed from said order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith in order that the errors may be corrected, and petitioners further pray that a citation be issued, as by law provided, commanding the respondent to appear be-

fore said Circuit Court of Appeals and that an order be made fixing the amount of the cost bond which petitioners shall give and furnish upon said appeal and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated this 17th day of August, 1937.

John W. Carrigan
Counsel for Clarence Ochs, Guy A. Kelley and
P. L. Newcomb, Petitioners,
510 West Sixth Street, Los Angeles, Calif.

[Endorsed]: Filed R. S. Zimmerman Clerk 2:00
o'clock Aug 17, 1937 P. M. By F. Betz, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Come now Clarence Ochs, Guy A. Kelley and P. L. Newcomb, petitioners in the above entitled cause, by John W. Carrigan, their attorney, and file with their petition for appeal from the order made and entered in said cause upon the 28th day of July, 1937, confirming the order of Hon. Hugh L. Dickson, Referee in Bankruptcy, the assignment of errors upon which they will rely from the prosecution of said appeal to the United States Circuit Court of Appeals for the Ninth Circuit. as follows:

I.

The Court erred in making that certain order denying petition for review and confirming the order of Referee, made and entered on the 28th day of July, 1937, and reading as follows:

“IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF CALI-
FORNIA CENTRAL DIVISION.

In the Matter of)	
	)	In Bankruptcy
FRED E. KEELER,)	
	)	No. 23666-C
a Debtor)	

ORDER IN RE PETITION FOR REVIEW FILED
BY CLARENCE OCHS, GUY A. KELLEY AND
P. L. NEWCOMB.

The Petition for Review filed by Clarence Ochs, Guy A. Kelley and P. L. Newcomb to review the order made

by the Honorable Hugh L. Dickson upon the 9th day of April, 1937, came on regularly to be heard before this Court upon Monday, the 28th day of June, 1937, John W. Carrigan appearing in behalf of petitioners and Ben S. Hunter appearing in behalf of O. T. Gilbank and Hugo W. Romberg, the Committeemen of the Estate of Fred E. Keeler, a debtor, and the matter having been argued orally and at the request of the parties submitted on briefs, and briefs having been filed by the respective parties to this proceeding, and the Court having fully considered the oral arguments and the briefs filed and having reviewed the testimony, and it appearing therefrom that the Findings of Fact made by the Honorable Hugh L. Dickson are correct and that his order made pursuant thereto is in accordance with the law,

IT IS ORDERED that said Petition for Review be and the same hereby is denied and the decision rendered herein by the Honorable Hugh L. Dickson be and the same hereby is confirmed.

IT IS FURTHER ORDERED that O. T. Gilbank and Hugo W. Romberg, as the Committeemen of the Estate of Fred E. Keeler, a debtor, recover from said petitioners their costs in this matter expended.

Dated: July 28, 1937.

Geo. Cosgrave
Judge.

Approved as to Form:

John W. Carrigan

Attorney for Petitioners

Ben S. Hunter

Attorney for Respondents."

II.

The Court erred in making said order for the reason that said conclusion of law, is not supported by and is contrary to the facts as established by the evidence.

III.

The Court erred in making and adopting its conclusion that the Findings of Fact made by the Honorable Hugh L. Dickson are correct, and that his order made pursuant thereto is in accordance with the law;

IV.

The Court erred as a matter of law in failing and refusing to find that the parties had themselves determined their rights under said contract and placed their own interpretation thereon.

V.

The Court erred as a matter of law in failing and refusing to find what the parties intended the language to mean of Paragraph 2 of the Contract;

VI.

The Court erred as a matter of law in failing and refusing to find what the parties understood the language to mean of Paragraph 2 of the contract;

VII.

The Court erred as a matter of law in failing and refusing to find that the Committeemen of the Estate of the debtor had acquiesced in the construction placed on the contract by the petitioners and their assignors;

VIII.

The Court erred as a matter of law in failing and refusing to find that when general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force;

IX.

The Court erred as a matter of law in failing and refusing to find that the Committeemen of the Estate of the debtor are estopped to maintain a position inconsistent with one in which they had acquiesced for a long period of time, and from which they had accepted benefits;

X.

The Court erred as a matter of law in failing and refusing to find that the paragraph number 4 of said contract entitled the petitioners to receive and retain sixty per cent of the net proceeds of all oil and gas produced, saved and sold from said premises;

XI.

The Court erred as a matter of law in failing and refusing to find that the petitioners are entitled to sixty per cent of all the oil and gas produced, saved and sold from said premises;

XII.

The Court erred as a matter of law in finding and concluding that petitioners are entitled to sixty per cent of seventy-five per cent of all oil and gas produced, saved and sold from said premises.

WHEREFORE, petitioners pray that said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated this 17th day of August, 1937.

John W. Carrigan
Counsel for Petitioners.

[Endorsed]: Filed R. S. Zimmerman 41 min past 2:00 o'clock Aug 17 1937 P. M. By M. J. Sommer Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF COST BOND.

Upon reading and filing the Assignment of Errors alleged by Clarence Ochs, Guy A. Kelley and P. L. Newcomb, the petitioners, and upon reading and filing the petition of said Clarence Ochs, Guy A. Kelley and P. L. Newcomb, for an allowance of an appeal and for an order fixing the amount of the cost bond on appeal, and good cause appearing therefor

IT IS ORDERED that an appeal by Clarence Ochs, Guy A. Kelley and P. L. Newcomb, be and the same is hereby allowed for the purpose of having and to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the order denying petition for review of the report of Hon. Hugh L. Dickson, Referee, and confirming said report heretofore made and entered in the above entitled cause on the 28th day of July, 1937, and that a duly authenticated transcript of the record of all proceedings and all evidence be transmitted forthwith to said Circuit Court of Appeals for such purpose.

IT IS FURTHER ORDERED that said Clarence Ochs, Guy A. Kelley and P. L. Newcomb shall file with the Clerk of this Court, a good and sufficient bond to be approved by this Court in the sum of \$250, conditioned that if said Clarence Ochs, Guy A. Kelley and P. L.

Newcomb shall prosecute their appeal to effect and shall answer all damages for costs in the event they fail to make good their appeal, then the obligation of said bond shall be void, otherwise to remain in full force and effect.

Dated this 17 day of August 1937.

Leon R. Yankwich

Judge.

For Judge Cosgrave who is out of the District.

[Endorsed]: Filed R. S. Zimmerman Clerk 41 min.
past 2:00 o'clock Aug 17 1937 P. M. By M. J. Sommer,
Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR COSTS ON APPEAL.

CLARENCE OCHS, GUY A. KELLEY and P. L. NEWCOMB having filed a petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California, Central Division, dated July 28, 1937, that the Petition to Review filed, of the order made by Honorable Hugh L. Dickson on the 9th day of April, 1937, be denied;

NOW, THEREFORE, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, authorized to do a general surety business, as Surety, hereby undertakes in the sum of Two Hundred Fifty and No/100 - - (\$250.00) Dollars, and promises on the part of the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb, that they will prosecute their appeal to effect; and that they will pay all costs and damages which may be awarded against them, or any of them, on the appeal, or on the dismissal thereof; and that the undersigned Surety further consents that in case of default or contumacy on the part of the said Clarence Ochs, Guy A. Kelley and P. L. Newcomb, execution to the amount named in this stipulation may issue against the goods, chattels and lands of the undersigned.

Signed, sealed and dated this 13th day of August, 1937.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND

[Seal] By W. H. Cantwell

W. H. Cantwell — Attorney in Fact

Attest S. M. Smith

S. M. Smith—Agent

STATE OF CALIFORNIA)
) ss:
 COUNTY OF LOS ANGELES)

On this 13th day of August, 1937, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal]

Theresa Fitzgibbons

Notary Public in and for the State of California,
 County of Los Angeles.

My Commission Expires May 3, 1938

Examined and recommended for approval as provided
 in Rule 28

John W. Carrigan
 Attorney

Approved this 17th Day of August, 1937.

Leon R. Yankwich,
 District Judge

[Endorsed]: Filed R. S. Zimmerman Clerk at 42 min
 past 2 o'clock Aug. 17, 1937 P. M. By M. J. Sommer,
 Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PRAECIPE

To R. S. ZIMMERMAN, Clerk of the United States District Court, In and for the Southern District of California, Central Division:

You will please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit duly authenticated copies of the following documents:

1. All docket entries of proceedings before the Court, including all Courts order on the petition of Clarence Ochs, Guy A. Kelley and P. L. Newcomb, to review the order of the Honorable Hugh L. Dickson, Referee in Bankruptcy;

2. Petition of O. T. Gilbank and Hugo W. Romberg for order to show cause by the Honorable Hugh L. Dickson, Referee in Bankruptcy, in re: Huntington Beach Well;

3. Order to show cause directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb re: Huntington Beach Well, issued by Hon. Hugh L. Dickson, Referee in Bankruptcy, the 16th day of March, 1937;

4. All exhibits introduced in evidence by Clarence Ochs, Guy A. Kelley and P. L. Newcomb, and filed by the Honorable Hugh L. Dickson, upon hearing to show cause;

5. Order directing Clarence Ochs, Guy A. Kelley and P. L. Newcomb to account re: Huntington Beach Well, signed by Hugh L. Dickson, Referee in Bankruptcy, the 9th day of April, 1937.

6. Petition to review Referee's order;

7. Certificate on Review of Hugh L. Dickson, Referee in Bankruptcy, June 9, 1937.

8. Supplemental certificate on review of Hugh L. Dickson, Referee in Bankruptcy, dated June 11, 1937;

9. Agreement, dated November 6, 1935, between Hugo W. Romberg and O. T. Gilbank, as Committeemen of the Estate of Fred E. Keeler, a Debtor, and Arthur G. Gage;

10. Minute order re: Judge Cosgrave, July 19, 1937;

11. Order of Judge Cosgrave of July 28, 1937;

12. Stipulation to settle and allow bill of exceptions;

13. Bill of Exceptions;

14. Petition for Appeal;

15. Assignment of Errors;

16. Order allowing appeal and fixing amount of bond;

17. Bond on appeal;

18. Citation on appeal;

19. Praecipe for transcript of record;

20. Clerk's certificate.

Dated: This 17th day of August, 1937.

John W. Carrigan

Counsel for Petitioners,

510 West Sixth Street, Los Angeles, California.

[Endorsed]: Service of the Above Praecipe and receipt of a copy thereof is hereby accepted and acknowledged this 17th day of August, 1937. Ben S. Hunter by Ben S. Hunter, Jr., Counsel for Respondents O. T. Gilbank and Hugo O. Romberg as Committeemen of the Estate of Fred E. Keeler, a Debtor.

Filed R. S. Zimmerman, Clerk at 43 min. past 2 o'clock Aug. 17, 1937 P. M. By M. J. Sommer, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 70 pages, numbered from 1 to 70 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; statement of docket entries; referee's certificate on review; referee's supplemental certificate on review; order of July 19, 1937; order of July 28, 1937 in re petition for review; stipulation; bill of exceptions; petition for appeal; assignment of errors; order allowing appeal; stipulation for costs on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of September, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,

Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

FRED E. KEELER,

a Debtor.

CLARENCE OCHS, GUY A. KELLEY and P. L. NEWCOMB,
Appellants,

vs.

O. T. GILBANK and HUGO O. ROMBERG, as Committeemen
of the Estate of FRED E. KEELER, a Debtor,
Appellees.

APPELLANTS' OPENING BRIEF.

JOHN W. CARRIGAN,
715 Associated Realty Bldg., Los Angeles,
Solicitor for Appellants

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No. 8665

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of

FRED E. KEELER,

a Debtor.

CLARENCE OCHS, GUY A. KELLEY and P. L. NEWCOMB,
Appellants,

vs.

O. T. GILBANK and HUGO O. ROMBERG, as Committeemen
of the Estate of FRED E. KEELER, a Debtor,
Appellees.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts Disclosing the
Basis Upon Which it Is Contended That the
District Court Had Jurisdiction and That the
United States Circuit Court of Appeals for the
Ninth Circuit Has Jurisdiction Upon Appeal to
Review the Order in Question.

O. T. Gilbank and Hugo O. Romberg, the regularly
elected, duly qualified and acting committee of the estate

of Fred E. Keeler, a debtor, appointed and elected pursuant to the terms of an extension proposal accepted and approved under the provisions of section 74 of chapter 8 of the Bankruptcy Act of the United States of America, filed a petition for order to show cause [R. p. 10] to the referee in bankruptcy, Honorable Hugh L. Dickson, alleging that on the 6th day of November, 1935, they entered into a certain agreement with Arthur G. Gage, annexing thereto and marked Exhibit "A" a full, true and correct copy of said agreement.

The petition further states that Arthur G. Gage had assigned said agreement and all rights accrued thereunder to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, the present owners and holders of said agreement.

Petitioners (appellees) further state that the estate of Fred E. Keeler, a debtor, had never at any time owned more than a 75% interest in the oil and gas produced from the well now located upon the premises described in said contract; that in making and entering into said contract petitioners (appellees) did not believe they were contracting, nor did they intend to contract, with reference to any oil or gas produced from said well other than that owned by said estate.

The said petition for order to show cause further alleges that Clarence Ochs, Guy A. Kelley and P. L. Newcomb (appellants) claim, by virtue of said contract, that they are entitled to 60% of all oil and/or gas produced from said well, instead of and in lieu of 60% of 75% of such

oil and/or gas, and that they (appellants) have retained 60% of the total proceeds of the oil and gas derived from said well, which has necessitated petitioners (appellees) paying to the Pacific Electric Land Company and Associated Oil Company out of the 40% paid to them (petitioners) the moneys due said companies; that Clarence Ochs, Guy A. Kelley and P. L. Newcomb claim they have the right so to do by virtue of said agreement. [Exhibit "A", R. p. 12.]

Petitioners (appellees) prayed that an order be made and directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb, commanding them to appear at a time and place to be named in said order and show cause, if any they have, why they should not be required to account to petitioners (appellees) for 15% of the oil and/or gas produced by them from said well, being the difference between 60% of the total production of said well and 60% of 75% of the production of said well. [R. p. 12.]

Whereupon Honorable Hugh L. Dickson, referee in bankruptcy, made an order directed to Clarence Ochs, Guy A. Kelley and P. L. Newcomb (appellants), commanding them to appear before said referee in bankruptcy upon the 30th day of March, 1937, at the place specified therein, and to show cause, if any they have, why they should not be required to account to the committeemen of the estate of Fred E. Keeler, a debtor, for the proceeds of 15% of the oil and/or gas produced and sold by them from the well upon the land described in Exhibit "A" of the petition on file.

That thereafter, and on or about the 9th day of April, 1937, Honorable Hugh L. Dickson, referee in bankruptcy, made his order directing Clarence Ochs, Guy A. Kelley and P. L. Newcomb to account for and pay over to O. T. Gilbank and Hugo O. Romberg, as committeemen of the estate of Fred E. Keeler, a debtor, the 15% of the proceeds derived from the sale of oil and gas produced by said well and not theretofore accounted for by them to said committeemen of said estate. [R. p. 22.]

A petition was thereafter filed by Clarence Ochs, Guy A. Kelley and P. L. Newcomb (appellants) to review referee's order. [R. p. 23.]

The petition to review referee's order came on regularly to be heard before Honorable Geo. Cosgrave, District Judge, and, after argument by the respective counsel, and the case being submitted on briefs, the Court made and entered its minute order [R. p. 40], wherein the petition for review was denied and the decision of the referee confirmed. The order of the Court was entered on July 29, 1937. [R. pp. 41 and 42.]

The jurisdiction of the District Court and the jurisdiction of this Court upon appeal to review said order is authorized by virtue of *11 U. S. C. A., Sec. 47; 28 U. S. C. A., Sec. 225; 11 U. S. C. A., Sec. 11, Chapter 2.*

The jurisdiction of this Court also rests upon the petition for and allowance of the appeal [R. pp. 59-65], bond for costs [R. p. 67], and assignment of errors [R. p. 61].

Statement of the Case.

Appellees, O. T. Gilbank and Hugo O. Romberg, as committeemen of the estate of the debtor, instituted these proceedings to recover 15% of the net proceeds of oil and gas produced from a well leased to appellants, Clarence Ochs, Guy A. Kelley and P. L. Newcomb. Proceedings based on contract. [R. p. 12.]

Appellees own four lots, located at Huntington Beach, California, upon which is located an oil well. [R. p. 13.]

The Pacific Electric Land Company was the prior owner of said lots. At the time the lots were deeded to the committeemen (appellees) the company reserved unto itself a one-fourth interest in any oil, gas or other hydrocarbon substances.

On November 6, 1935, the committeemen leased the premises to Arthur G. Gage. [R. p. 12.]

Mr. Gage and the committeemen, through Mr. Holoday, their agent, negotiated for six or eight months before the contract was executed. [R. p. 45.] Mr. Gage informed Mr. Gilbank that he would have to have 60% of the oil from the premises. [R. p. 46.] Mr. Gilbank then sent Mr. Gage to Mr. Hunter's office to have the contract drawn. [R. p. 46]. Mr. Hunter, as attorney for the committeemen, drew the contract. Later Mr. Gage learned that Mr. Gilbank said a poor contract had been drawn and that it was ambiguous. Thereupon Mr. Gage, in company with Mr. Holoday, went to Mr. Hunter's office, and Mr. Hunter said "it wasn't ambiguous, but meant that I (Gage) was to get 60%, the receiver was to get 15%; the Pacific Electric Land Company was to get 25%". [R. p. 46.]

Mr. Gage testified that his understanding with Mr. Gilbank was that he was to receive 60% of all oil and gas produced. Mr. Holoday also testified that Mr. Hunter said it was a 60-40 contract, and that Gage would receive 60%, the estate 40%, out of which they would have to pay 25% royalty, and have a net of 15% left.

Mr. Gage took possession and proceeded to operate the oil well. Thereafter he assigned his contract to Martin and Moore, retaining unto himself 10% of all oil and gas produced from said premises. [R. p. 53.] Martin and Moore operated the property from January 25, 1936, to some date in March, 1936. The Dehydrating Company, purchasers of the oil from Gage and his assignees, in accordance with instructions received from the committeemen, accounted to Martin and Moore for 50%, to Gage 10% and to the committeemen 40%. [R. p. 53.]

Martin and Moore assigned to appellants, who took over the lease in March, 1936. They did not produce oil from the well until late in the fall of 1936. Their first remittances were made in October, 1936, and were made on the basis of 60-40 of production. [R. p. 52.] Remittances continued to be made by appellants to the committeemen, in accordance with instructions given the Dehydrating Company by the committeemen. [R. p. 53.]

On January 15, 1937, Mr. Newcomb (one of the appellants) went to Mr. Gilbank's office. [R. p. 53.] The matter of royalties was not discussed, although Mr. Newcomb went there to pay the committeemen their share of the same, to-wit, 40%.

Mr. Gilbank told Mr. Newcomb that they (appellants) were facing some dispute as to the interpretation they placed on the contract. That was the first notice appellants had from anyone interested in the estate that there

was any difference of opinion regarding the interpretation of the contract. [R. p. 54.]

At that time Mr. Newcomb (appellant) paid Mr. Gilbank 40% from the sale of the oil. [R. p. 54.] Mr. Gilbank did not tell Mr. Newcomb the reason appellants would be attacked, or on what basis, but told him that he was perfectly satisfied with the conditions on which the oil had been operated and the performance of appellants' part of the contract. [R. p. 54.]

On March 13, 1937, Honorable Hugh L. Dickson, referee in bankruptcy, issued an order to show cause [R. pp. 18-19], directed to Ochs, Kelley and Newcomb (appellants). Prior to that time the committeemen had not discussed the contract with appellants, or demanded any additional royalties from them.

The gross receipts derived from the sale of oil were \$3361. [R. p. 54.] The appellants paid out \$4398. This sum included the amounts paid to the committeemen. The amount paid out was \$1037 in excess of the amount received.

The preamble of the agreement, Exhibit "A" [R. p. 13], provides: "EXCEPTING therefrom an undivided one-fourth of all minerals contained in said real property, * * *," although paragraph 4 [R. p. 15] of the body of the agreement provides that appellants "shall be entitled to receive and retain sixty per cent (60%) of the net proceeds of all oil and gas produced, saved and sold from said premises".

On the 28th day of July, 1937, the District Court ordered that the petition for review be denied, and that the decision rendered by Honorable Hugh L. Dickson, referee in bankruptcy, be confirmed. [R. pp. 61-62.]

Specification of Assigned Errors Relied Upon and Reference to the Record Where Such Assignments Appear.

The assignment of errors, as they appear in the record [R. p. 61], are as follows:

1. The Court erred in making that certain order denying petition for review and confirming the order of referee, made and entered on the 28th day of July, 1937, reading as follows: [R. p. 61.]

2. The Court erred in making said order for the reason that said conclusion of law is not supported by and is contrary to the facts as established by the evidence.

3. The Court erred in making and adopting its conclusion that the findings of fact made by the Honorable Hugh L. Dickson are correct, and that his order made pursuant thereto is in accordance with the law.

4. The Court erred as a matter of law in failing and refusing to find that the parties had themselves determined their rights under said contract and placed their own interpretation thereon.

5. The Court erred as a matter of law in failing and refusing to find what the parties intended the language to mean of paragraph 2 of the contract.

6. The Court erred as a matter of law in failing and refusing to find what the parties understood the language to mean of paragraph 2 of the contract.

7. The Court erred as a matter of law in failing and refusing to find that the committeemen of the

estate of the debtor had acquiesced in the construction placed on the contract by the petitioners and their assignors.

8. The Court erred as a matter of law in failing and refusing to find that when general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force.

9. The Court erred as a matter of law in failing and refusing to find that the committee of the estate of the debtor are estopped to maintain a position inconsistent with one in which they had acquiesced for a long period of time, and from which they had accepted benefits.

10. The Court erred as a matter of law in failing and refusing to find that the paragraph numbered 4 of said contract entitled the petitioners to receive and retain sixty per cent of the net proceeds of all oil and gas produced, saved and sold from said premises.

11. The Court erred as a matter of law in failing and refusing to find that the petitioners are entitled to sixty per cent of all the oil and gas produced, saved and sold from said premises.

12. The Court erred as a matter of law in finding and concluding that petitioners are entitled to sixty per cent of seventy-five per cent of all oil and gas produced, saved and sold from said premises.

Appellants' assignment of errors, set forth in the transcript of record and above repeated, may be embraced within one assignment of fundamental error, which, if

found to be well taken, will sustain the collateral assignments, viz.:

I.

The lower Court erred in its conclusion that twenty-five per cent of the oil had been excepted, and that the parties to the contract never contracted with reference to it, and, from such conclusion, in making its order denying petition for review of Clarence Ochs, Guy A. Kelley and P. L. Newcomb, and confirming the decision of the referee.

Propositions of Law.

Appellants submit the following propositions of law upon which the foregoing assignment is predicated:

I.

When parties to a contract have placed their own interpretation upon its terms and have acquiesced therein, it must be held that the parties have themselves determined their rights under said contract, and the Court will follow their interpretation, even though it be erroneous.

II.

Doubtful and ambiguous language employed by the maker of a contract in drafting its provisions, must be construed most strongly against such maker.

III.

The intent of the parties at the time the contract was entered into must control.

IV.

The committeemen are now estopped from raising the subject of the interpretation of the lease.

ARGUMENT.

POINT I.

When Parties to a Contract Have Placed Their Own Interpretation Upon Its Terms and Have Acquiesced Therein, it Must Be Held That the Parties Have Themselves Determined Their Rights Under Said Contract, and the Court Will Follow Their Interpretation, Even Though it Be Erroneous.

The Dehydrating Company that received the oil derived from the well on the premises of appellees made payment of the royalties in accordance with instructions received from the committeemen [R. p. 53], and this was on the basis of appellants receiving 50%, Gage 10%, Romberg and Gilbank, the committeemen for the estate 40%. [R. p. 53.] That was the basis upon which the parties operated in disbursing the royalties for the year 1936, and the committeemen continued to receive such royalties without protest, or making any demand on Gage or his assignees, prior to the filing of their petition for order to show cause, which occurred on the 16th day of March, 1937. [R. p. 19.] It was not denied at the hearing by the appellees that they had given instructions to the Dehydrating Company to make payment of the royalties on the basis as hereinabove set forth. They acquiesced in the construction placed on the contract by Mr. Gage and his assignees, because it was the construction agreed upon between Mr. Gage and Gilbank and Romberg. [R. p. 46.] The parties having placed their

own interpretation upon the terms of the contract and the acts of the parties done subsequent thereto in accordance with such interpretation afford one of the most reliable clues to the intention of the parties. The following cases support that principle of law:

McKell v. Chesapeake etc. R. Co., 175 Fed. 321,
99 C. C. A. 109, 20 Ann. Cas. 1097;

Webster v. Clark, 34 Fla. 637;

Mayberry v. Alhambra etc. Co., 125 Cal. at p. 446;

Mitau v. Roddan, 149 Cal. at p. 14;

Hill v. McKay, 94 Cal. p. 5, 29 Pac. 406;

Rockwell v. Light, 6 Cal. App. 563;

Keith v. Electrical Engineering Co., 136 Cal. 178;

Woodard v. Glenwood Lumber Co., 171 Cal. 513;

Preston v. Herminghaus, 211 Cal. p. 1.

POINT II.

**Doubtful and Ambiguous Language Employed by the
Maker of a Contract in Drafting Its Provisions
Must Be Construed Most Strongly Against Such
Maker.**

When Mr. Gilbank and Mr. Gage agreed upon the terms of the lease [R. p. 46], Mr. Gilbank then sent Mr. Gage to Mr. Hunter's office for the purpose of having Mr. Hunter draw the contract. Mr. Hunter was the attorney for the committeemen. [R. p. 46.] When the question subsequently arose concerning the interpretation of the contract Mr. Gage, in company with Mr. Holoday, went to Mr. Hunter's office and told him that Mr. Gilbank was contending the contract should be read 60-75. [R. p. 49.] Mr. Hunter, who had drawn the lease, stated that Mr. Gilbank was "all wet"; that the contract was not ambiguous; that it meant 60% to the operator, 15% to the committeemen and 25% to the Associated Oil. [R. p. 49.] Mr. Holoday, who had formerly been the agent for the committeemen, stated that Mr. Hunter told him that the royalties under the provisions of the contract [R. p. 51] were 60-40, and that Mr. Gage would get 60% and the estate 40%, out of which they would have to pay 25% royalties, and have a net of 15% left. [R. p. 51.]

At the hearing before Honorable Hugh L. Dickson, and at the time this testimony was introduced, Mr. Hunter was present and acting as counsel for the committeemen. He heard the witnesses testify concerning his (Hunter's) interpretation of the lease, yet he (Mr. Hunter) made no denial, excepting to say that his opinion could not alter the plain provisions of the lease. The law is well settled and established that a written contract should, in case of

doubt, be interpreted against the party who has drawn it. See *section 242, 6 Ruling Case Law*, at page 854. The Court will adopt that construction of the contract which is in favor of the promisee:

Home of the Friendless v. Rouse, 8 Wall. 430, 19 U. S. L. Ed. 495;

Joy v. St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 U. S. L. Ed. 843; quoted in *German-American Mercantile Bank v. Illinois Surety Co.*, 99 Wash. p. 9, 168 Pac. 772; cited in *Torrey v. Cannon*, 171 N. C. 519, 88 S. E. 768.

We quote from section 1654 of the Civil Code of the state of California:

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party * * *.”

The Court said, in *Courtture v. Ocean Park Bank*, 205 Cal. 338, at page 344:

“It is well settled that where an instrument is uncertain as to its terms it is to be construed most strongly against the party thereto who caused such uncertainty to exist.”

See, also, to the same effect:

Payne v. Neuval, 155 Cal. 46, 99 Pac. 476;

Union Construction Co. v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242;

Bennett v. Potter, 180 Cal. 736, 183 Pac. 156.

POINT III.

The Intent of the Parties at the Time the Contract Was Entered Into Must Control.

Section 1859 of the Code of Civil Procedure provides:

“* * * and in the construction of the instrument the intention of the parties is to be pursued, if possible; and when a general and a particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.”

In the *Reedy v. Smith*, 42 Cal. 245, case it is said that the object of a contract is to ascertain the intention of the parties in entering into it.

The Court said, in the case of *Gardner v. California Guarantee Investment Co.*, 137 Cal. 71, at page 75:

“Hence, while the contract remains in force, and not barred by the statute, there can be no bar to the proof of the real intention of the parties or to the reformation of the contract.”

In the case of *Tennant v. Wilde*, 98 Cal. App. at page 445, the Court said:

“For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation

between, and declarations of, the parties during the negotiations at and before the time of the execution of the contract may be shown. (Code Civ. Proc., secs. 1860, 1861; *Atlanta v. Schmeltzer*, 83 Ga. 609 (10 S. E. 543); *Keller v. Webb*, 125 Mass. 88 (28 Am. Rep. 209); *Long v. Long*, 44 Mo. App. 141; *Swett v. Shumway*, 102 Mass. 365 (3 Am. Rep. 471).)''

See, also:

6 *Ruling Case Law*, sec. 225, at p. 835.

Prior to the execution of the contract Mr. Gage, in discussing its provisions, told Mr. Gilbank that he could not produce the property unless he got 60% of the oil on the property. [R. p. 46.] There was a meeting of the minds on that basis as to a division of the oil produced. Whereupon Mr. Hunter drew the lease, providing for the payment to Gage of 60% of the net proceeds of all oil and gas produced, saved and sold from said premises. [R. p. 15.]

If it had not been the intention of the parties that Mr. Gage was to receive 60% of the whole it would have been a very easy matter to have stated in the lease "60% of 75% of the net proceeds of all oil and/or gas produced".

POINT IV.

The Committeemen Are Now Estopped From Raising the Subject of the Interpretation of the Lease.

We quote from 10 *Ruling Case Law*, section 22, at page 694:

“The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. In order to raise an estoppel by acquiescence the party estopped must have been aware of his own rights and have perceived that the other party was acting on a mistaken notion of his rights.”

The courts have held acquiescence by inaction or silence constitutes a bar.

Hoyt v. Sprague, 103 U. S. 613.

“A person looking on and assenting to that which he has power to prevent is precluded ever afterwards from maintaining an action for damages.”

Gill v. United States, 160 U. S. 426, 16 S. Ct. 322, 40 U. S. (L. Ed.) 480.

“Acceptance of contract price for material supplied in excess of contract requirement.”

Chas. Nelson Co. v. United States, 261 U. S. 17.

The committeemen accepted the benefit of the work done by Mr. Gage and his assignees in taking 300 barrels of water out of the well at great expense to Gage and his assignees, thereby enhancing the value of the property, and they are now estopped from placing a construction on the contract at variance with the construction they heretofore placed on it.

In this connection, see:

Brant v. Virginia Coal Co. etc., 93 U. S. 326;

Peoples Bank v. Manufacturers Nat. Bank, 101 U. S. 181;

Compton v. Jessup, 167 U. S. 1;

Oregon etc. R. Co. v. United States, 238 U. S. 393.

Conclusion.

Appellants therefore respectfully submit that, upon each of the points and assignment of errors, the order should be reversed.

JOHN W. CARRIGAN,

Solicitor for Appellants.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

FRED E. KEELER,

Debtor.

CLARENCE OCHS, GUY A. KELLEY, and P. L. NEWCOMB,
Appellants,

vs.

O. T. GILBANK and HUGO W. ROMBERG, as Committee-
men of the Estate of Fred E. Keeler, debtor,
Appellees.

APPELLEES' BRIEF.

RAPHAEL DECHTER and
GEORGE T. GOGGIN,

By R. DECHTER,

633 Subway Terminal Bldg., Los Angeles, Calif.,
Attorneys for Appellees.

FILED

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No. 8665

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

In the Matter of

FRED E. KEELER,

Debtor.

CLARENCE OCHS, GUY A. KELLEY, and P. L. NEWCOMB,
Appellants,

vs.

O. T. GILBANK and HUGO W. ROMBERG, as Committee-
men of the Estate of Fred E. Keeler, debtor,
Appellees.

APPELLEES' BRIEF.

Statement of the Case and Facts.

O. T. Gilbank and Hugo W. Romberg are the duly elected, qualified, and acting trustees or committeemen under Section 74 of the Bankruptcy Act of the estate of Fred E. Keeler, debtor, and as such trustees acquired in the management and operation of the estate a certain deed covering real property located at Huntington Beach, California, upon which property was located an unproducing oil and gas well, together with oil well machinery, equipment, and supplies. [Tr. 14.] The deed to said property excepted and reserved to the grantors an undivided one-fourth of all minerals contained in said real property, including, but not limited to, oil, gas, and other hydrocarbon substances. [Tr. 13.] The committeemen,

desiring to place the well on production, had numerous negotiations with various persons, including one Arthur G. Gage, and on or about the 6th day of November, 1935, entered into an agreement with the said Gage for the sole purpose of placing the well back on production and to maintain and operate it thereafter. [Tr. 12 to 17.]

A few weeks after November 6, 1935, Gage had a discussion with Gilbank, one of the committeemen, with respect to the agreement, at which time Gilbank informed him (Gage) that the contract conveyed to Gage 60% of 75% of the production from said property. [Tr. 46 and 49.] Subsequently, and during the month of February or March, 1936, Gage assigned and transferred the agreement to Ochs, Kelley, and Newcomb [Tr. 52], the appellants herein. Late in the fall of 1936, the well was placed on production by the efforts of the appellants. The first remittance from the oil produced was made to the committeemen on the 30th day of October, 1936. [Tr. 52.] Approximately two months thereafter, and on the 15th day of January, 1937, Gilbank complained to Newcomb, one of the appellants herein, that the appellants were not accounting to the committeemen for the proceeds of the oil sold in accordance with the contract with Gage. [Tr. 52.] Therafter, and on or about the 16th day of March, 1937, the trustees filed a petition for an accounting and an order to show cause was issued directed against the appellants.

A hearing was had before the referee in bankruptcy, at which time the appellants introduced testimony. At the close thereof, and without introducing, and reserving the right to introduce, oral testimony in contradiction of that of appellants, the committeemen moved for a judgment in their favor upon the ground that "the contract speaks for

itself.” The referee, acting upon said motion, found that the contract was clear and unambiguous and could not be altered by oral testimony. [Tr. 8.] Thereafter a petition for review was filed which was heard before the Honorable George Cosgrave, U. S. District Judge, at which time the matter was argued, briefs were filed, and the matter submitted. After due consideration, the Court entered its minute order on the 19th day of July, 1937, finding and ordering as follows:

“Twenty-five per cent of the oil having been excepted, the parties to the contract never contracted with reference to it. The subject of the contract therefore is seventy-five per cent of the oil produced. (9 Cal. Jur. 322.) I find myself compelled therefore to agree with the referee. The petition for review is denied and the decision of the referee confirmed.” [Tr. 40.]

Questions Presented.

The essence of appellants’ propositions of law, followed by argument, appears to be as follows:

1. That the contract between the committeemen and Gage is ambiguous.
2. The committeemen have acquiesced in the interpretation placed upon the contract by the appellants.
3. That the committeemen are estopped from placing a construction on the contract different from that of appellants.

The contentions of appellees, however, are:

1. That the contract is clear, explicit, and unambiguous.
2. That the committeemen are not estopped from enforcing a strict compliance with the terms of the contract.

ARGUMENT.

I.

The Contract Entered Into by and Between the Committeemen and Gage Is Clear, Explicit, and Unambiguous.

We believe that the primary question to be decided by this appeal is whether or not the decisions of the referee and the judge of the U. S. District Court are erroneous in finding that the contract is clear and unambiguous and that the same could not be altered or changed by oral testimony. [Tr. 8 and 40.] In presenting this point, we will also consider and discuss points 1, 2 and 3 of appellants' brief.

The Court will, of course, in construing this agreement have in mind that oil in place is part of the realty, and that the agreement should be construed as one affecting real property.

Isom v. Rex Crude Oil, 147 Cal. 659;

Bartholomae Oil Corp. v. Delaney, 112 Cal. App. 314;

Callahan v. Martin, 3 Cal. (2d) 110;

Laugharn v. Bank of America, 88 Fed. (2d) 551 (C. C. A. 9th).

The Court's attention is directed to the clear and explicit language used in the agreement describing the property owned by the committeemen of the estate of the debtor [Tr. 13], which reads as follows:

“Lots One (1), Three (3), Five (5), and Seven (7), in Block 219 of Huntington Beach, Seventeenth Street Section, in the City of Huntington Beach, County of Orange, State of California, as per map

thereof recorded in Book 4, at page 10, of Miscellaneous Maps, records of said Orange County;

“Excepting therefrom an undivided one-fourth of all minerals contained in said real property, including but not limited to oil, gas, and other hydrocarbon substances, as reserved in the deed from Pacific Electric Land Company, a corporation, to Hugo W. Romberg and O. T. Gilbank, as Committeemen for the Estate of Fred E. Keeler, dated August 14, 1935, and filed for record August 30, 1935, in the office of the County Recorder of said Orange County;”

It is apparent at the very outset that the committeemen represented that they were the owners of only three-fourths of the minerals in place and it nowhere appears in the agreement, either directly or indirectly, by inuendo, by reference, or otherwise that they had any right whatever to speak for the owner of the reserved and excepted portion of the property. It is an elementary principle of law that where a reservation or exception is provided for in a deed, it is as though that portion of the property so reserved or excepted had never been included in the deed.

Lummer v. Unruh, 25 Cal. App. 97, 142 Pac. 914:

“An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted which but for the exception would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed.”

Forest Lakes Mutual Water Co. v. Santa Cruz Land Title Co., 98 Cal. App. 489, 277 Pac. 172:

“Where the common grantor conveyed certain land reserving for himself . . . the water of the stream

. . . the reservation of the water was an exception . . . *and operated to withhold from the thing granted the right to the water so excepted and described.*”

It is contended by the appellants that by virtue of paragraph 4 of the agreement [Tr. 15] that they are entitled to 60% of 100% of all of the oil and gas produced, saved, and sold from said premises. The Court will note that the language contained in said paragraph 4 is very clear and explicit in that it recites, “60% of . . . all oil and gas produced, saved, and sold *from said premises*”. There being but one description of real property in the agreement, “*said premises*” can refer to no other premises than those first described, from which is excluded that portion of the premises belonging to the grantor, the Pacific Electric Land Company. To give any other meaning or construction to this agreement would be to draw an entirely new agreement, for there was only one description of the premises to which the agreement could possibly refer. Likewise, to give any other construction to the agreement would in effect hold that the committeemen contracted, and the Court approved a contract covering “premises” over which neither the committeemen themselves nor the Court had any power, control, or jurisdiction. The referee in bankruptcy and the reviewing judge of the U. S. District Court ruled that the 60% of the oil and gas produced from said premises referred to the premises solely under the control and jurisdiction of the committeemen and of the Court, and which constitutes a 75% interest in all minerals contained in said real property. [Tr. 20, 22 and 40.] Hence, 60% to be retained by the appellants could be computed only upon the oil and

gas owned by the estate and not upon the oil and gas to which the estate had no title or interest and which was not a subject upon which the committeemen could contract. We believe that a careful reading of the agreement, the construction of which is herein involved, makes obvious the correctness of the rulings and findings of the referee in bankruptcy and of the U. S. District Court.

The first point of appellants' brief is to the effect that the evidence in this case substantiates a conclusion that the committeemen acquiesced in the interpretation placed upon the contract by the appellants. This, in our opinion, is an instance where "the wish is the father of the thought". The Court realizes, of course, that the committeemen did not introduce any oral evidence at the trial for the reason that the lower court found that the contract was clear, explicit, and unambiguous. Where such a finding is made the Court will not under any conditions substitute its interpretation of the contract for that of the parties. A most recent decision expounding this fundamental point of law is found in the case of *Bacciocco v. Curtis*, 94 Cal. Dec., page 337 (Sept. 24, 1937) as follows:

" . . . It is equally well settled that when the contract is clear and unambiguous, the courts will not substitute their interpretation when such course would establish a contract radically different from the one made."

See, also, 6 *Ruling Case Law*, page 835, and 836, Sec. 225:

"It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties, and then carry out that intention regardless of whether the instrument contains language

sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument.”

But, nevertheless, the record herein shows that Gilbank and Hunter (the attorney for the committeemen), even before the contract was assigned or any work done on the well by the appellants, insisted to Mr. Gage that the contract conveyed 60% of 75% of the production. [Tr. 46 and 49.] The record also shows that payments were made to the committeemen from October 30, 1936, and that Gilbank, one of the committeemen, objected to the distribution approximately two months later. [Tr. 52.] It is obvious, therefore, from these facts that at no time have the committeemen acquiesced in the constrained construction that the appellants are now attempting to place on the contract.

The cases cited by the appellants on this point are cases not remotely connected with the facts in the instant case. They are used merely to cite a general principle of law and are all similar to the case of *Mitau v. Roddan*, 149 Cal. page 14, which is cited by appellants. This is a case where the parties to a contract harmoniously carried out the terms of a contract over a number of years and even up to the month of its repudiation. The Court held, of course, that the parties had placed a practical construction upon the contract. We have been unable to find any case which upholds the theory expounded by the appellants that the Court will follow the interpretation placed upon a contract by the parties even though it be erroneous. See Sec. 241, 6 Ruling Case Law, at page 852.

The second point of appellants' brief attempts to argue that the contract is ambiguous and that the provisions

thereof must be construed most strongly against the maker. In support of this contention, the appellants rely upon certain testimony given by their witnesses. However, it will again be noted that before Mr. Gage assigned the contract to the appellants or before the appellants performed any work on the well, Hunter and Gilbank informed Gage at a meeting that the contract was 60% of 75% of the production. [Tr. 46.]

Parkovich v. Southern Pac. R. R. Co., 150 Cal. 39, at page 45:

“A reservation or exception in a grant is to be interpreted in favor of the grantor.”

The appellants attempt to infer that because Mr. Hunter did not testify and because he made no denial to the statements made by the appellants' witnesses, that the trustees are bound by appellants' testimony. Construing the statements most liberally in favor of the appellants as set forth in their brief at page 15 on this point, the Court will note that the statements alleged to have been made by Mr. Hunter are not statements of a fact, but merely express a legal opinion by Mr. Hunter. The Supreme Court in the case of *Herman Sturm v. Boker*, 150 U. S. 312, states:

“What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally known to both parties. Such statements of opinion do not operate as estoppel. If he had said in express terms that by the contract he was responsible for the loss, it would have been, under the circumstances, only the expression of an opinion as to the law of the contract and not such a declaration or admission of a fact such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument.”

See also *Crary v. Dye*, 208 U. S. 515, 52 L. Ed. 595; and *Horton v. Winbigler*, 175 Cal. 149, to the effect:

“Where there is nothing ambiguous or uncertain in the terms of written instruments, they speak for themselves, and the attorney who prepared them cannot testify as to what was intended by their terms.”

The third point of appellants' brief in substance is to the effect that the contract intended to state that Gage was to receive 60% of 100% of the production. The appellants have undertaken to show what the parties to the contract intended by the language used and for that purpose refer to certain negotiations at and before the time of the execution of the contract, and refer only to an alleged statement made by Mr. Gage that he could not produce the property unless he got 60% of the oil on the property. (App. Br. p. 18.) The appellants, however, have overlooked the admission of Mr. Gage that his preliminary negotiations were based upon proposals in the form of letters and that they provided, first, for the payment to the Pacific Electric Land Company *and then for a division*. [Tr. 47.] Appellants contend that if it was not the intention of the parties that Mr. Gage was to receive 60% of the whole, the parties would have stated that he was to receive 60% of 75%. If this contention be true, then the provisions in paragraph 5 of the contract [Tr. 15] mean that the committeemen's interest is 40% of the whole, instead of 40% of 75%. Is it possible that the appellants can argue that “First Party's oil and gas” means not only their own but the oil and gas reserved, excepted, and belonging to the grantor, the Pacific Electric Land Company? The answer, in our opinion, is axiomatic, for as Judge Cosgrave in his minute order has said, “Twenty-five per cent of the oil being excepted, the parties to the contract never contracted with reference to it. The subject of the contract therefore is seventy-five per cent of the oil produced.”

II.

The Committeemen Are Not Estopped From Enforcing a Strict Compliance With the Terms of the Contract.

In presenting this point we will also consider the fourth and final point of appellants' brief.

The requirements requisite to the establishment of an estoppel *in pais* are academic. The Supreme Court of the United States has said in the case of *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, that

“For the application of that doctrine there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud by which another has been misled to his injury. . . . The primary ground of the doctrine is that it would be fraud in a party to assert what his previous conduct had denied when on the faith of that denial others have acted.”

Certainly the appellants will not contend that there was any deception in the conduct or statements of the committeemen or such gross negligence on their part as to amount to fraud by which the appellants have been misled to their injury.

The Court will note that the appellants have not introduced any evidence which would tend to show that the appellants either knew of or relied upon any statements of Hunter or acts of Gilbank, which could be asserted as constituting conduct which estops the estate from enforcing a strict compliance with the terms of the contract. If Gilbank's actions, together with those of his attorney, Hunter, could by any stretch of the imagination be termed to constitute an estoppel, the answer is obvious:

The powers of the committee are joint, not several; hence the act of one member of the committee, whether it be intentional or unintentional, could not bind the committee as a whole, and therefore could not bind the estate.

Where there are two or more trustees, they must act jointly in order to have their acts bind the beneficial estate or have any validity. In this instance, there is no testimony concerning Romberg, the co-trustee or co-committeeman. This rule is well established, examples of which are found in the following decisions of the U. S. Supreme Court:

Wilbur v. Almy, 12 Howard 178, 13 L. Ed. 944;
Winslow v. Baltimore Railroad, 188 U. S. 646, 47
L. Ed. 635.

That appellants “labored an extra day or spent an extra dollar upon the faith” of any of the statements of the appellees or upon their conduct the record fails to disclose.

Conclusion.

In conclusion we maintain and contend that the contract out of which this controversy has arisen is clear, explicit, and unambiguous, and that the same cannot be changed or altered by oral testimony.

We respectfully submit that the judgment of the referee in bankruptcy and that of the District Court should be affirmed.

RAPHAEL DECHTER and
GEORGE T. GOGGIN,

By R. DECHTER,

Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY EARL DUNLAP,

Appellant,

vs.

E. B. SWOPE,

Warden of United States Penitentiary
McNeil Island, Washington,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
of the United States for the Western District
Southern Division.

FILED

OCT 21 1937

United States
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HENRY EARL DUNLAP,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD.

For Petitioner and Appellant:

MAURICE KADISH,
720 Joseph Vance Building,
Seattle, Washington.

For Respondent and Appellee:

J. CHARLES DENNIS,
U. S. Attorney,
Seattle, Washington.

OLIVER MALM,
Assistant U. S. Attorney,
Tacoma, Washington.

In the United States District Court for the Western
District of Washington, Southern Division,
Tacoma, Washington.

No. 8536.

HENRY EARL DUNLAP,

Petitioner,

vs.

E. B. SWOPE,

Warden of United States Penitentiary,
McNeil Island, Washington,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge of the United States District Court for the Western District of Washington, Southern Division, at Tacoma, Washington.

Comes now petitioner Henry Earl Dunlap, plaintiff in the above entitled action, respectfully avers and alleges that he is being illegally restrained of his liberty by E. B. Swope, Warden of the United States Penitentiary at McNeil Island, Washington, and/or his Deputies, and/or his agents, all of whom are within the jurisdiction of this Honorable Court, and that the said illegal restraint is also within the jurisdiction of this Honorable Court.

I.

That Petitioner avers that the sole color of authority by which he is restrained by the said Warden Swope is a Judgment of the District Court of the United States of America within and for the Central Division of the Southern District of California. That petitioner attaches hereto, and by this reference makes a part hereof, the aforesaid judgment and labels same Exhibit A. The said judgment was found after a plea of guilty to three counts of an indictment found against petitioner in the aforesaid court.

II.

That Petitioner further avers that the said judgment, sentencing him to the United States Penitentiary is in excess of jurisdiction in part, and that he has hereunto served the term which was within the jurisdiction of the court, and is therefore now being held in such excessive part contrary to the Constitution of the United States of America and statutes so provided. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

III.

That Petitioner alleges that the charges of the indictment in all five counts were based on the single intent of manufacturing counterfeit money. That Petitioner further states that on motion of the United States Attorney at Los Angeles, Counts one and two of the aforesaid indictment, a copy of which is attached hereto and by this reference made a part hereof, labelled Exhibit "B", were dropped from the indictment, for lack of other evidence or other cause. That Petitioner further alleges that he did plead guilty to Count Three charging him with the unlawful possession of counterfeit money, (Title 18, Section 277, U. S. Code,) that he did plead guilty to Count Five, charging him with unlawful possession of molds for the manufacture of counterfeit money (Title 18, Section 283, U. S. Code.)

IV.

That Petitioner was thereupon on the aforesaid plea of guilty sentenced to serve two years on Counts Three and Four, and Six years on Count Five, the said counts to run consecutively and not concurrently. Petitioner alleges that the Court was in excess of jurisdiction in giving three separate sentences to run consecutively as only one **crime**, with one criminal intent, was committed and therefore only one sentence was legal.

V.

That Petitioner maintains that he commenced the service of the term on Count Three, namely two

years, on the 7th day of October, 1935. By reason of his good behavior he alleges that he has been allowed the statutory good time on this sentence of two years, as provided by statute, and by reason of this good time should have been discharged from service of the said sentence on May 15, 1937. That Petitioner further avers that he is now being illegally held in restraint to answer to the judgments in Counts Four and Five of the aforesaid indictment and judgment, both of which counts are in excess of jurisdiction and therefore void and illegal and invalid, and Petitioner is therefore entitled to his discharge and so prays to be ordered discharged in the premises. [2]

Wherefore, your Petitioner prays that a writ of Habeas Corpus be issued, directed to E. B. Swope, Warden of said United States Penitentiary, and to have said E. B. Swope produce the body of your Petitioner before this Honorable Court at a time and date certain to be set and designated by this Honorable Court and to then and there show cause why our Petitioner should not be released from custody and restraint forthwith.

And your Petitioner prays for such other and further relief at law or equity as the Court may deem just and equitable.

MAURICE KADISH,
DAVID BAILEY SMITH,
Attorneys for Petitioner.

United States of America,
State of Washington,
County of Pierce.—ss.

Whereas, Henry Earl Dunlap, being first duly sworn, deposes and says that he is the Petitioner named herein, and that he has carefully read and noted the allegations, averments and the statements contained herein, and that of his own knowledge and belief, all the facts stated therein are the truth except those which are stated on knowledge and belief, and those are true to his best knowledge.

H. EARL DUNLAP,

Petitioner.

Subscribed and sworn to before me this 17th day of June, 1937.

[Notary Seal]

ALAN P. COX,

Notary Public in and for the County
of Pierce, State of Washington,
residing at Tacoma. [3]

EXHIBIT "A".

At a stated term, to wit: The September Term, A.D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 7th day of October, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Leon R. Yankwich, District Judge.

No. 12552-Y-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY EARL DUNLAP,

Defendant.

This case coming on for the arraignment and plea of defendant Henry Earl Dunlap; Charles H. Carr, Assistant U. S. Attorney, appearing for the Government, and the defendant being present in court without counsel, waives an attorney; after which, the said defendant is informed of the substance of the indictment by the Clerk of the Court, states his true name to be as given therein, and upon being required to plead, enters his plea of not guilty to the first and second counts, and guilty as to the third, fourth, and fifth counts; thereafter, Charles H. Carr, Esq., makes a statement from the report.

The Court now pronounces sentence upon defendant Henry Earl Dunlap for the crime of which he stands convicted, to-wit: Sections 277, 278, and 283, Title 18, U. S. Code; and, it is the judgment of the Court that the said defendant on each of the third and fourth counts be imprisoned in a Federal Penitentiary to be hereafter designated by the United States Attorney General or such representative as he may choose to act for him, for the term and period of two years on each count, and as to the fifth

count to be imprisoned in said penitentiary for the term and period of six years, said terms of imprisonment to run consecutively. Counts Nos. 1 and 2 are ordered dismissed. [4]

EXHIBIT "B".

No. 12552-Y

Filed.....

Viol: Sections 277, 278, and 283, Title 18, United States Code.

In the District Court of the United States in and for the Southern District of California, Central Division.

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the second Monday of September in the year of our Lord one thousand nine hundred thirty-five:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California and inquiring for the Southern District of California upon their oath present:

That

Henry Earl Dunlap, alias Earl Evans, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit:

On or about the 12th day of September, 1935, at Los Angeles, County of Los Angeles, State, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully, feloniously and fraudulently, and with the intent then and there to defraud, pass, utter, publish and sell, and attempt to pass, utter, publish and sell, **certain false and counterfeit coins in resemblance and similitude of silver coins which had been coined and stamped at the mints and assay offices of the United States, that is to say, one hundred (100) false and counterfeit coins in resemblance and similitude of the ten cent coins of the United States, and the said false and counterfeit coins, at the time the said defendant so passed, uttered, published and sold the same, were in the resemblance and similitude of the ten cent coins current in the United States and in actual use and circulation as money within the United States, the said defendant then and there well knowing the said coins to be false, forged and counterfeited;**

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [5]

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That Henry Earl Dunlap, alias Earl Evans, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the

Southern District of California, heretofore, to-wit: On or about the 12th day of September, A.D. 1935, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully, feloniously and fraudulently, and with the intent then and there to defraud, pass, utter, publish and sell certain falsely made, forged and counterfeited coins, to-wit: In resemblance and similitude of the five cent minor coins of the United States, the said defendant then and there well knowing the said coins to be falsely made, forged and counterfeited;

Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Henry Earl Dunlap, alias Earl Evans, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit: On or about the 12th day of September, A.D. 1935, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully, feloniously and fraudulently have in his possession certain false and counterfeit coins, to-wit: Sixty-six (66) false, forged and counterfeit coins in resem-

blance and similitude of silver coins of the United States, and forty-five (45) coins in the resemblance and similitude of the ten cent silver coins of the United States and twenty-one [6] (21) coins in the resemblance and similitude of the twenty-five cent silver coins of the United States, the said defendant then and there well knowing the said coins to be false, forged and counterfeit, and the said defendant having the said false, forged and counterfeit, coins in his possession with the intent to defraud divers persons whose names are to the Grand Jurors unknown;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Henry Earl Dunlap, alias Earl Evans, hereinafter called the defendant, whose full and true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit: On or about the 12th day of September, A.D. 1935, at Los Angeles, Los Angeles County, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully, feloniously and fraudulently have in his possession certain falsely made, forged and counterfeited coins, to-wit: Fifty (50) falsely made, forged and counterfeited coins

in resemblance and similitude of minor coins which had been coined at the mint of the United States, to-wit: In resemblance and similitude of the five cent minor coins of the United States, the said defendant then and there well knowing the said coins to be falsely made, forged and counterfeited, and the said defendant having the said falsely made, forged and counterfeited coins in his possession with the intent to defraud divers persons, whose names are to the Grand Jurors unknown;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fifth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present: [7]

That Henry Earl Dunlap, hereinafter called the defendant, whose full and true name is, other than as herein stated, to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit: On or about the 12th day of September, 1935, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously, and without lawful authority have in his possession certain plaster of Paris molds in likeness and similitude as to the design and inscriptions thereon of molds designated for the coining and making of genuine silver coins of the United States that have been or may here-

after be coined at the mints of the United States to-wit: Two sets of plaster of Paris molds for the making and counterfeiting of Ten Cent (10¢) coins, and three sets of plaster of Paris molds for the making and counterfeiting of Twenty-five cent (25¢) coins;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

PIERSON M. HALL,
United States Attorney.
WM. FLEET PALMER,
Assistant United States
Attorney.

[Endorsed]: A true bill, Jno. O. Knight, foreman. Filed Oct. 2, 1935, R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk.

Received a copy of the within this 23 day of June, 1937. Oliver Malm.

[Endorsed]: Filed June 22, 1937. [8]

[Title of Court and Cause.]

ORDER.

Good cause appearing, it is ordered:

Let the Writ issued, returnable before the Honorable E. E. Cushman, Judge of the United States District Court for the Western District of Wash-

ington, Southern Division, on Saturday, the 26th day of June, 1937, at the hour of ten (10) A. M.

EDWARD E. CUSHMAN,
Judge U. S. District Court.

Presented by:

MAURICE KADISH,
Attorney for Petitioner.

[Endorsed]: Filed Jun. 23, 1937. [9]

[Title of Court and Cause.]

WRIT OF HABEAS CORPUS.

To the United States of America, E. B. Swope,
Warden of Penitentiary, at McNeil Island,
Washington, and United States Marshal, Greeting:

We command you, that you have the body of Henry Earl Dunlap, by you imprisoned and detained, as it is said, together with the time warrant and cause of such imprisonment and detention, by whatsoever name, said Henry Earl Dunlap shall be named or charged, before Honorable E. E. Cushman, Judge of United States District Court for the Western District of Washington, Southern Division, Tacoma, Washington, at the court room of said Court in the County of Pierce, on the 26th day of June, 1937, at 10:00 o'clock A. M., of that day, to do and receive what shall then and there

be considered concerning the said Henry Earl Dunlap.

And have you then and there this writ.

Honorable EDWARD E. CUSHMAN.

a Judge of the United States District
Court for the Western District of
Washington,

This 23rd day of June, A. D. 1937.

Attest my hand and seal of said United States
District Court for the Western District of Wash-
ington, Southern Division, the day and year last
above written.

[Court Seal]

EDGAR M. LAKIN,

Clerk,

By E. W. PETTIT,

Deputy. [10]

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington.—ss.

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein-named E. B. Swope, Warden United States Penitentiary, McNeil Island, Washington, by calling him on the telephone and notifying him of the contents of the writ, he accepting the service over the telephone, and by mailing him a true and correct copy of the

writ in said District on the 25th day of June, A.D. 1937.

A. J. CHITTY,

U. S. Marshal.

By H. C. DeLINE,

Deputy.

Marshal's fee \$2.

[Endorsed]: Filed Jun. 25, 1937 [10-a]

[Title of Court and Cause.]

DEMURRER.

Comes now Oliver Malm, Assistant United States Attorney for the Western District of Washington, on behalf of E. B. Swope, Warden of the United States Penitentiary on McNeils Island, and respondent herein, and demurs to the petition herein filed upon the following reasons and grounds:

I.

That the petition heretofore filed herein does not state facts sufficient to constitute a basis for the issuance of a writ of habeas corpus.

II.

That the said petition does not state facts sufficient to entitle the petitioner to discharge from his present confinement.

III.

That the said petition does not set forth sufficient or any facts to show that said petitioner has been, or is being illegally restrained by the respondent

herein, or by an other agent or officer of the United States of America.

J. CHARLES DENNIS,
United States Attorney.

OLIVER MALM,
Assistant United States Attorney.

Copy of foregoing Demurrer received June 26,
1937.

MAURICE KADISH,
DAVID BAILEY SMITH,
of Counsel Atty. for Petitioner.

[Endorsed]: June 26, 1937. [11]

United States District Court, Western District of
Washington, Southern Division.

No. 8536.

HENRY EARL DUNLAP,

Petitioner,

vs.

E. B. SWOPE, Warden of the United States Peni-
tentiary on McNeil Island,

Respondent.

ORDER SUSTAINING DEMURRER.

This matter coming on regularly for hearing on the petition of petitioner herein, Petitioner being represented by Maurice Kadish, and David B. Smith, attorneys, Respondent being represented by

Oliver Malm, Asst. United States Attorney for this district, and petitioner having testified on his own behalf, and argument having been heard by the Court, it is now

Ordered that the Demurrer of Respondent be, and the same is hereby sustained; the Petition for Writ of Habeas Corpus is denied, the rule of the Warden vacated and the petitioner remanded to the warden's custody to resume the service of his sentence.

Done in open court this 26th day of June, A.D. 1937.

EDWARD E. CUSHMAN,
United States Judge.

To all of which Petitioner makes an Exception and the exception is allowed.

EDWARD E. CUSHMAN,
United States Judge.

Approved as to form.

MAURICE KADISH,
Attorney for Petitioner.

[Endorsed]: Jun. 26, 1937. [12]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Edward E. Cushman, Judge of the above-entitled Court:

The above-named petitioner, Henry Earl Dunlap, feeling himself aggrieved by the judgment and order denying the release of the above-named peti-

tioner, entered in this cause on the 26th day of June, 1937, does hereby appeal from said judgment and order, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which such judgment and order denying the release of the above-named petitioner, was based, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco in the State of California.

Dated at Tacoma, Washington, this 29th day of June, A.D. 1937.

MAURICE KADISH,

Attorney for Petitioner.

Received a copy of the within Pet. for appeal this 29 day of June, 1937.

OLIVER MALM,

Asst. U. S. Atty.

[Endorsed]: Filed Jun. 29, 1937 [13]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Petition for appeal from the judgment and order of this Court denying the release of the petitioner herein having been filed, as appears from the files of this Court, and the Court having considered the

same and being of the opinion the appeal should be allowed, now therefore,

It is hereby ordered that the appeal of the petitioner, Henry Earl Dunlap, to the Circuit Court of Appeals for the Ninth Circuit of the United States, from the order and judgment of this Court made and entered herein on the 26th day of June, 1937, be and the same is hereby allowed.

Done at Tacoma, Washington, this 30th day of June, A.D. 1937.

EDWARD E. CUSHMAN,
District Judge.

Received a copy of the within Order this 30 day of June, 1937.

OLIVER MALM,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 30, 1937. [14]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the petitioner, Henry Earl Dunlap, through his attorney, Maurice Kadish, and says that the judgment and order entered herein on the 26th day of June, 1937, is erroneous and unjust for the following reasons:

I.

The Court erred in holding that the petitioner has no complaint and that it was not necessary for the Court to decide if the counts were one offense.

II.

The Court erred in holding that petitioner is being lawfully held and imprisoned and should not be discharged.

III.

The Court erred in denying the relief prayed for by the petitioner.

Dated at Tacoma, Washington, this 29th day of June, 1937.

MAURICE KADISH,
Attorney for Petitioner.

Received a copy of the within Assignment this 29 day of June, 1937.

OLIVER MALM,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 29, 1937. [15]

[Title of Court and Cause.]

PETITIONER'S EXCEPTIONS TO THE
ORDER AND JUDGMENT.

Comes now the petitioner, and in a conformity with the order of the Court entered herein on the 26th day of June, 1937, excepts to the order and judgment made by the Court herein, said exceptions being as follows:

I.

Petitioner excepts to that portion of said order and judgment finding that petitioner has no complaint and that it was not necessary for the Court to decide if the counts were one offense.

II.

Petitioner excepts to that portion of said order and judgment finding that petitioner is being lawfully held and should not be discharged.

Dated at Tacoma, Washington, this 29th day of June, 1937.

MAURICE KADISH,
Attorney for Petitioner.

The foregoing exceptions, I. and II. are allowed:

EDWARD E. CUSHMAN,
District Judge.

Received a copy of the within Petrs. Exceptions this 29 day of June, 1937.

OLIVER MALM,
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 30, 1937. [16]

[Title of Court and Cause.]

ORDER.

Pursuant to the Motion herein, it is hereby Ordered, that the record herein may be filed on or before August 30, 1937.

Done at Tacoma, this 22 day of July, 1937.

EDWARD E. CUSHMAN,
United States District Judge.

Presented by:

MAURICE KADISH,
Attorney for Petitioner.

Approved:

OLIVER MALM,
Asst. U. S. Atty.

[Endorsed]: Filed Jul. 22, 1937. [17]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above entitled Court:

You will please prepare, and duly authenticate, the transcript and the following portions of the record in the above entitled case for appeal of the appellant herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of Habeas Corpus;
2. Order;
3. Writ of Habeas Corpus;
4. Demurrer;
5. Order Sustaining Demurrer;
6. Petition for Appeal;
7. Order Allowing Appeal;
8. Assignment of Errors;
9. Petitioner's Exceptions to the Order and Judgment;
10. Citation on Appeal;
11. Praecipe.

MAURICE KADISH,

Attorney for Appellant.

Rec'd Copy: July 10, 1937.

J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed Jul. 12, 1937. [18]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT
OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare, and duly authenticate, the transcript and the following portions of the record in the above entitled case for appeal of the appellant herein to the United States Circuit Court of Appeals for the Ninth Circuit:

12. Order.

13. Amended Praecipe.

MAURICE KADISH,

Attorney for Appellant.

Rec'd Copy: July 23, 1937.

J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed Jul. 24, 1937. [19]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
Western Dis. of Washington.—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing typewritten sheets numbered 1 to 19 both inclusive, are a full, true and correct copy of so much of the record, papers and proceedings in the case of Henry Earl Dunlap, Petitioner and Appel-

lant vs. E. B. Swope, Warden of United States Penitentiary, McNeil Island, Washington, Respondent and Appellee, cause No. 8536 in said Court, as required by praecipe of counsel filed and of record in my office in said District Court at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify, that attached to this transcript is the original citation in this cause.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and on behalf of the appellant herein for making of the appeal record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, viz:

Appeal fee	\$5.00
Clerk's fees (63 folios at 5¢).....	3.15
Clerk's certificate to record .....	.50

Total	\$8.65

I further certify that the costs and fees amounting to \$8.65, has been paid to me by the appellant.

In witness whereof, I have hereunto affixed the seal of said Court at Tacoma, Washington, this 27 day of August, 1937.

[Seal]

EDWARD M. LAKIN,
Clerk,

By E. W. PETTIT,
Deputy. [20]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America,
To: The above-named respondent E. B. Swope and
to Oliver Malm, Assistant United States Attorney,
his attorney: Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within Thirty (30) days from and after the date of this citation, pursuant to appeal filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein Henry Earl Dunlap is petitioner and appellant, and E. B. Swope, Warden of the United States Penitentiary on McNeil Island, is respondent, to show cause, if any there be, why the order and judgment rendered against the said Henry Earl Dunlap, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to said party in that behalf.

Witness, The Honorable Edward E. Cushman,
District Judge of the United States at Tacoma,

Washington, within said District, this 30th day of June, A.D. 1937.

EDWARD E. CUSHMAN,
District Judge.

Received a copy of the within Citation this 30 day of June, 1937.

OLIVER MALM,
Asst. U. S. Atty.

[Endorsed]: Lodged Jun. 30, 1937. [21]

[Endorsed]: No. 8668. United States Circuit Court of Appeals for the Ninth Circuit. Henry Earl Dunlap, Appellant, vs. E. B. Swope, Warden of United States Penitentiary McNeil Island, Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed Sept. 20, 1937.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY EARL DUNLAP,	<i>Appellant,</i>
vs.	
E. B. SWOPE, Warden of the United States Penitentiary at McNeil's Island, Washington,	<i>Appellee.</i>

Appeal From the District Court of the United States
of America, in and for the Western District of
Washington, Southern Division.

Brief of Appellant

MAURICE KADISH,
DAVID BAILEY SMITH,
Attorneys for Appellant.

J. CHARLES DENNIS,
OLIVER MALM,
Attorneys for Appellee.

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No. 8220
In the
UNITED STATES

CIRCUIT COURT OF APPEALS

For the Ninth Circuit

HENRY MAHL DUNLAP,
Appellant,
vs.

E. M. SWOMB, Warden of the
United States Penitentiary at
McNeil's Island, Washington.
Appellee.

FILED

NOV 22 1937

PAUL P. O'BRIEN,
CLERK

Appeal from the District Court of the United States of America, in and
for the Western District of Washington, Southern Division.

BRIEF OF APPELLANT

ERRATA

The following errors appear in brief for appellant in the
above action:

Page 2, paragraph 6: "That the order of commitment directed
that the Count Five be served first, and the others in reverse
order."

Should be made to read: "The two year sentence on Count Three,
the two year sentence on Count Four, and the six year sentence
on Count Five; are to be served consecutively and not concu-
rently. In other words; the two year sentence on Count Four
shall not begin until the expiration of the two year sentence
on Count Three; and the six year sentence on Count Five shall
not begin until the expiration of the two year sentence on
Count Four."

Page 11, CONCLUSION, lines 1 and 2: The date: October 5, 1935;
should be made to read: October 7, 1935.

Page 11, CONCLUSION, line 4: The date: October 5, 1937; should be made to read: October 7, 1937.

Page 11, CONCLUSION, lines 4, 5, 6, 7, 8, 9 & 10: "Allowing the petitioner eight days for each month of the sentence, as provided by law for good conduct, petitioner would have received 192 days of good time allowance. Deducting this from October 5, 1937, the petitioner's term, under sentence of two years on the first indictment, would terminate on the 28th day of March, 1937."

Should be made to read: Allowing the petitioner six days for each month of the sentence, as provided by law for good conduct, petitioner would have received 144 days of good time allowance. Deducting this from October 7, 1937, the petitioner's term under sentence of two years on the first count, would terminate on the 15th day of May 1937.

Appellant respectfully prays that the aforesaid corrections be noted, and recorded.

Respectfully submitted,

Henry Earl Dunlap
HENRY EARL DUNLAP. REG. NO. M-EX 80.

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JURISDICTION OF THE COURT

This is an appeal from an Order in the District Court of the Western District of Washington, Southern Division, sustaining the Demurrer of the Government to the Petitioner's Petition, and an appeal from the denial of the application for a Writ of Habeas Corpus, upon an indictment charging the unlawful possession of counterfeit money (Section 277, Title 18, U. S. C.) and the unlawful possession of molds for the manufacture of counterfeit money. (Section 283, Title 18, U. S. C.)

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY EARL DUNLAP,

Appellant,

vs.

E. B. SWOPE, Warden of the United
States Penitentiary at McNeil's Island,
Washington,

Appellee.

No. 8668

Appeal From the District Court of the United States
of America, in and for the Western District of
Washington, Southern Division.

Brief of Appellant

STATEMENT OF THE CASE

Petitioner applied for a Writ of Habeas Corpus, asking his release from the custody of the Warden at McNeil Island Penitentiary. The petition discloses that the sole authority for the Warden to hold petitioner is a final commitment issued by the United States District Court for the Southern District of California, Central Division, on the 7th day of October, 1935.

Briefly and chronologically, the events concerning the imprisonment of HENRY EARL DUNLAP on this appeal are as follows:

1. On the 2nd day of October, 1935, five counts of one indictment were filed against the petitioner in the United States District Court for the Southern District of California, Central Division.

2. Petitioner thereafter pleaded guilty to counts 3, 4, and 5 of the indictment, and counts 1 and 2 were dropped for lack of evidence, or other causes.

3. Pursuant to said pleas of guilty, petitioner was sentenced to serve two years on Counts Three and Four, and six years on Count Five, all to run consecutively, and not concurrently.

4. Pursuant to said judgment, a commitment was issued out of said court to the United States Marshal, dated the 7th day of October, 1935, commanding him to take and keep and safely deliver the petitioner to the keeper or warden or other officer of the United States' Penitentiary at McNeil's Island, forthwith.

5. Petitioner was received at McNeil's Island Penitentiary the 31st day of October, 1935.

6. That the order of commitment directed that the Count Five be served first, and the others in reverse order.

7. The records of McNeil's Island Penitentiary show that the prisoner's conduct has been exemplary, entitling him to good time off.

STATEMENT OF QUESTION INVOLVED

The foregoing statement of fact presents the following question for determination: Whether or not the facts show that but one crime or offense has been committed, and the petitioner is entitled to his release on the ground that having served one sentence for the offense, his continued imprisonment constitutes a double punishment.

ASSIGNMENTS OF ERROR

The court erred in denying the petition of HENRY EARL DUNLAP for a Writ of Habeas Corpus herein, and in remanding him to the custody of E. B. Swope, Warden of the U. S. Penitentiary at McNeil's Island, Washington, to serve the remainder of the sentences heretofore imposed upon him.

ARGUMENT

The petitioner was sentenced for the possession of several denominations of coins, each violating a section of the revised statutes: Title 18, Section 277, U. S. Code, and Title 18, Section 283, U. S. Code.

In 65 Federal 402, U. S. vs. Howell, the defendant was charged in several separate counts, each alleging possession of a different denomination of coins. The court held that though he could be charged in several counts, he could only be sentenced on one.

The court, in Logan vs. U. S., 123 Federal 291, stated that two offenses cannot be created out of the same

criminal act by charging the defendant in one count with having forged a national bank note and in another count with having forged a signature on the same note.

Much the same situation was presented to the court by the case of Hans Nielsen, petitioner, 131 U. S. 176. Here separate indictments had been found against the petitioner under each of two statutes, charging him with co-habitation and also with adultery. On a motion for a writ of Habeas Corpus, it was agreed that a regular judgment of conviction cannot be attacked collaterally by Habeas Corpus. On page 182 of the opinion, it affirmed:

“It is firmly established that if a court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the defendant who is in prison under and by virtue of it may be discharged from custody on Habeas Corpus.”

The court also quoted with approval *Ex Parte Siebold*:

“And if their want of power appears on the record of its condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him.”

Ex Parte Siebold, 100 U. S. 371, lays down the rule that personal liberty is so important in the eyes of the law, that the judgment of an inferior court is not deemed so conclusive but that the question of the court's authority to try to imprison the party may be repudi-

ated on a Habeas Corpus which a superior court or judge having authority to issue the writ.

In 198 Federal 72, Charles Munson vs. Robert W. McClaughry, Warden, the following was held:

“The sentence of a defendant, convicted on two separate counts of an indictment, of burglary of a postoffice building with intent to commit larceny, and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is *ultra vires* and void as to the sentence for the larceny, and after the defendant has satisfied the sentence for the burglary, he is entitled to his release on habeas corpus.

“The excess of a judgment beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess is entitled to his release by writ of Habeas Corpus.

“The petitioner was indicted, convicted, and sentenced under one count of an indictment to a fine and imprisonment for five years for forcibly breaking into a building used in part as post office, with intent to commit larceny in the part of the building so used, and under another count of the same indictment to imprisonment for one year to begin after the expiration of the sentence for five years, for stealing postage stamps and other property belonging to the Post Office Department of the United States from the same building at the same time that he committed the offense of breaking with intent to commit larceny, charged in the first count of the indictment.

“A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break, with criminal intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is once firmly established. Bishop, at paragraphs 1062, 1063, and 1064 of his work on Criminal Law, cites authorities on each side of this question, and gives the opinion that ‘to make a burglary thus double, and punish it twice, first as burglary and secondly as larceny, hardly accords with the humane policy of our law’.”

It seems to be the established rule that where burglary, with an intent to steal, and stealing at the same

time, are charged in a single count, and there is a general verdict of guilty, the larceny is merged in the burglary, and a sentence for the burglary only can be inflicted, although separate penalties are prescribed by the statutes for burglary and larceny. *State v. McClung*, 35 W. Va. 280, 13 S. E. 654; *Com. v. Hope*, 22 Pick. 1; *Kite v. Com.*, 11 Met. 581; *Roberts v. State*, 55 Miss. 421, 424.

The highest judicial tribunals of Massachusetts, Kentucky, Pennsylvania, and Georgia have decided that burglary with intent to commit larceny and larceny, at the same time and as a part of the same transaction, may not be lawfully punished as separate offenses, because they are parts of a single continuous act, inspired by a single criminal intent. *Triplett v. Com.*, 84 Ky. 193, 1 S. W. 84, 85; *Yarborough v. State*, 85 Ga. 396, 12 S. E. 650; *Com. v. Birdsall*, 69 Pa. 482, 485, 8 Am. Rep. 283.

The excess of a sentence beyond the jurisdiction of the court which renders it is as void as a judgment without any jurisdiction; and a prisoner held under such excess alone, is entitled to his release by writ of Habeas Corpus. *Ex Parte Lange*, 18 Wall. 163, 176, 178, 21 L. ed. 872, 878, 879; *Michigan Trust Co. v. Ferry*, 99 C. C. A. 221, 231, 175 Fed. 667, 677; *Mackey v. Miller*, 62 C. C. A. 139, 141, 126 Fed. 161, 163; *Ex Parte Peeke* (D. C.) 44 Fed. 1016. As the petitioner had satisfied his sentence for the burglary with intent to commit the larceny, and was held only under a void sentence for the larceny committed at the same time and as a part of

the same continuous criminal act, inspired by the same criminal intent as was the burglary, he was entitled to his discharge.

Petitioner claims that although each count charges an offense under a statute of different number, still, inasmuch as they cover the same transaction, he can suffer but one punishment therefor.

In *Stevens v. McClaughry*, the petitioner had been charged in counts with taking, stealing, and carrying away certain postal matter, and had received a sentence of five years on the first two counts, and five years on the last four counts. Petitioner served the first term of five years and applied for a writ of Habeas Corpus, alleging the offenses of which he was convicted constituted a single continuing criminal act, inspired by the same felonious intent, which was equally essential to each of the offenses charged in the indictment, and the excess over five years, the maximum under Sec. 5469, was beyond the jurisdiction of the court, and void. The court quoted *Munson v. McClaughry*, 198 Fed. 72; *Halligan v. Wayne*, 179 Fed. 112; *In re Snow*, 120 U. S. 274; *re Nielsen*, 131 U. S. 176; *Kite v. Com.*, 11 Met. 581; *Triplett v. Com.*, 84 Ky. 193; *Yarborough v. State*, 12 S. E. 650; *Com. v. Birdsall*, 69 Pa. 482, saying:

“The principle upon which the decisions in these cases rests is that two or more separate offenses, which are committed at the same time and are parts of a single continuing criminal act, inspired by the same criminal intent which is essen-

tial to each offense, are susceptible to but one punishment.”

The court discussed the rule that charges of separate offenses of the same class may be joined in the same separate counts of the same indictment, observing:

“But this rule and the practice under it does not detract from the soundness or effect of the principle that two or more separate offenses which are committed at the same time and are parts of a continuing criminal act inspired by the same indispensable felonious intent are susceptible of but one punishment.”

“In order that separate offenses charged in one indictment may carry separate punishments, they must rest on distinct criminal acts, and therefore, if they were committed at the same time and were parts of a continuous criminal act, and inspired by the same criminal intent which is an essential element of each offense, they are susceptible of but one punishment. *MUNSON v. McCLAUGHRY*, 198 Fed. 72; 117 C. C. A. 180, 42 L. R. A. (N. S.) 302; *STEVENS v. McCLAUGHRY*, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390.”

“The term ‘same offense’, in Constitutional prohibition against double jeopardy, signifies same criminal act or omission rather than same offense *eo nomine*. (Const. Art. 2, No. 21.) And the State, after electing to prosecute offense in one of its aspects, cannot prosecute for same criminal acts under color of another name.” *Hunter v. State*, 277 Pac. 953.

“Acquittal of charge of making false entries in Federal Reserve Bank’s book barred prosecution for false entry relating to same transaction in another book.” (12 U. S. C. A. 3592). U. S. v. Adams, 281 U. S. 202, 50 S. Ct. 269, 74 L. Ed. 807.

“After dismissal of indictment for conspiracy to bribe, in language adequate to charge bribery, subsequent indictment for bribery constituted double jeopardy.” *Ex Parte Getzoff*, 286 Pac. 1044. (See *Ex Parte Berman*, 286, 1043.)

“A single sale of heroin constitutes but one offense, notwithstanding the failure to register, pay special tax, or obtain written order. (26 U. S. C. A. No. 691, et seq.) *Ballerini v. Alderholt*, 44 Fed. (2d) 352. Separate counts based upon a single sale of heroin, charged the ‘same offense,’ and supported a plea of double jeopardy.”

The point seems well established from this case that the pleadings may set out any number of separate counts and separate indictments for joint offenses, but the prisoner can only be tried and convicted for one offense, if it can be shown by the pleadings and defense that the omission or offense was committed with a singular intent and was one continuous offense inseparable in any part from any part of the other.

In the case at bar, only a single intent motivated the omissions and offenses charged in the indictment, from which it follows that only one sentence could be inflicted on the petitioner and that the sentences on subsequent counts were in excess of the jurisdiction of the court and should be stricken from the record and the

petitioner's discharge be ordered forthwith, petitioner having served the first two year term with the benefit of statutory good time allowance.

CONCLUSION

Petitioner having been sentenced on October 5, 1935, to terms of two, two and six years, on the respective three indictments, his two year period would have been fulfilled on October 5, 1937. Allowing the petitioner eight days for each month of the sentence, as provided by law for good conduct, petitioner would have received 192 days of good time allowance. Deducting this from October 5, 1937, the petitioner's term, under sentence of two years on the first indictment, would terminate on the 28th day of March, 1937.

It is, therefore, respectfully submitted that petitioner having already served past the time as provided for by the sentence on the first indictment, his conduct having been exemplary, as shown by the record, further detention is illegal, and the petition herein should be granted to free the petitioner from any further illegal restraint.

Respectfully submitted,

MAURICE KADISH,
DAVID BAILEY SMITH,
Attorneys for Petitioner.

No. 8668

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT 17

HENRY EARL DUNLAP,

Appellant,

—vs.—

E. B. SWOPE, Warden of the United States Penitentiary
at McNeil Island, Washington,

Appellee.

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney.

OLIVER MALM,
Assistant United States Attorney.

Attorneys for Appellee.

Office and Post Office Address:
324 Federal Building, Tacoma, Washington.

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PAUL P. O'BRIEN,

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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HENRY EARL DUNLAP,

Appellant,

—vs.—

E. B. SWOPE, Warden of the United States Penitentiary
at McNeil Island, Washington,

Appellee.

Upon Appeal from the District Court of the United States
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Southern Division

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The facts involved in the above matter are partially agreed upon by the parties, but appellee desires to make certain additions to the statement of facts as set forth in appellant's brief.

On October 2nd, 1935, the petitioner was indicted by a grand jury in the District Court of the United States for the Southern District of California, Central Division, by an indictment comprised of five counts (Tr. 7, 12). In view of the fact that Counts I and II of that indictment were subsequently dismissed, no further reference need be made thereto (Tr. 7).

Count III of the indictment charged the petitioner with having violated Sec. 277 of Title 18 of the United States Code, in that he had in his possession certain counterfeit *silver* coins at the time and place designated, with knowledge of the fact that said coins were counterfeit, and with intent to defraud. (Tr. 9, 10).

By Count IV of the indictment petitioner was charged with having violated Sec. 278 of Title 18, United States Code, in that he had in his possession certain counterfeit *minor* coins at the time and place designated, which were the identical time and place involved in aforesaid Count III, with knowledge of the fact that said coins were counterfeit, and with intent to defraud (Tr. 10, 11).

By Count V of the indictment petitioner was charged with having violated Sec. 283 of Title 18, United

States Code, in that he had in his possession at the time and place designated, which were the identical time and place involved in aforesaid Counts III and IV, "certain plaster of paris molds in likeness and similitude as to the design and inscription thereon of molds designated for the coining and making of genuine silver coins of the United States, that have been or may hereafter be coined at the mints of the United States" (Tr. 11, 12).

On October 7th, 1935, the petitioner entered a plea of guilty to said Counts III, IV and V, and was sentenced to serve two years on Count III, two years on Count IV, and six years on Count V, the said terms being specifically designated "*to run consecutively*". (Tr. 6, 7.)

The petitioner commenced service of the aforesaid sentence on October 7th, 1935, and has continuously been and now is confined under the direction of the Attorney General of the United States by reason thereof (Tr. 3, 4).

To the petition herein, appellee filed a demurrer based substantially upon the grounds that the petition-

er's petition failed to show that the petitioner's present confinement is illegal or that petitioner should be discharged from his present confinement (Tr. 15, 16).

By order of the District Court, appellee's demurrer was sustained, the petition for writ of habeas corpus was denied, and the petitioner was remanded to appellee to resume the service of his sentence (Tr. 16, 17).

STATEMENT OF THE QUESTION INVOLVED

There are two related questions raised by this petition:

The first is whether petitioner is entitled to be released from confinement when he, admittedly, has not served the period of the lawful sentence imposed upon him;

And the second is whether consecutive sentences may be imposed upon one admittedly guilty of simultaneously violating Secs. 277, 278 and 283 of Title 18, United States Code.

POINTS AND AUTHORITIES

The sentence imposed upon petitioner clearly reflects the intent of the court sentencing him and no doubt arises therefrom.

United States v. Daugherty, 269, U.S. 360, 363.

The restraint of a prisoner must be unlawful before he may be released by a writ of habeas corpus.

McNally v. Hill, Warden, 293, U.S. 131, 138;
Smith v. Johnston, Warden, (CCA9) 83 Fed.
 (2d) 321, 322;
Hans Neilsen, Petitioner, 131 U.S. 176, 185.

The several statutes under which petitioner was sentenced are distinct in purpose and function, and consecutive sentences may be imposed for simultaneous violation thereof.

Section 277, Title 18, U.S.C.A.;
Section 278, Title 18, U.S.C.A.;
Section 283, Title 18, U.S.C.A.;
Baender v. Barnett, 255 U.S. 224, 227;
Baender v. United States, (CCA9) 260 Fed.
 832, 834, cert. den. 252 U.S. 586;
Johnston v. Lagomarsino, (CCA9) 88 Fed. (2d)
 86.

The cases and rulings relied upon by the appellant furnish no authority for his discharge by writ of habeas corpus.

United States v. Howell, (D.C. Cal.) 65 Fed. 402, 407;

Logan v. United States (CCA6) 123 Fed. 291;

Hans Neilsen, Petitioner, 131 U.S. 176, 182;

In re Coy, 127 U.S. 731. 758;

Halligan, Warden v. Wayne (CCA9) 179 Fed. 112;

Munson v. McClaughry, Warden, (CCA8) 198 Fed. 72;

Ex parte Lange, 85 U.S. 163;

Michigan Trust Co. v. Ferry, (CCA8) 175 Fed. 667, 677;

Mackey v. Miller, (CCA9) 126 Fed. 161;

Ex parte Peeke (D. C.) 144 Fed. 1016;

Stevens v McClaughry, (CCA8) 207 Fed. 18;

Ballerini v. Aderholt, (CCA5) 44 Fed. (2d) 352.

ARGUMENT

THE SENTENCE IMPOSED UPON PETITIONER
LEAVES NO DOUBT AS TO THE INTENT OF
THE COURT WHICH IMPOSED THAT SEN-
TENCE.

The petitioner has in no way questioned the fact that the sentence imposed upon him by the United States District Court for the Southern District of California, Central Division, in all particulars clearly expresses the intent that court had at the time the sentence was pronounced. The sentence reveals that the court intended to impose a total term of imprisonment of ten years upon petitioner. In such respect the sentence is in accord with the rule prescribed by the Supreme Court in the case of *United States v. Daugherty*, 269 U.S. 360, 363.

RESTRAINT MUST BE UNLAWFUL BEFORE A
PRISONER MAY BE RELEASED BY WRIT OF
HABEAS CORPUS.

By the provisions of Section 283, Title 18, United States Code, which statute was the basis of Count V

of the indictment here involved, a maximum term of ten years may be imposed upon one found guilty of having violated that statute. The prisoner plead guilty to said Count V and a sentence of six years' imprisonment was thereupon imposed on him. The petition reveals on its face that petitioner has not completed service of that portion of the sentence and he is, for that reason alone, not entitled to be presently discharged by writ of habeas corpus. Until a prisoner has completed the portion of the sentence which he admits to be valid, he is in no position to urge the invalidity of a claimed invalid portion of such sentence.

McNally v. Hill, Warden, 293 U.S. 131, 138;

Smith v. Johnston, Warden, (CCA9) 83 Fed. (2d) 321, 322;

Hans Neilsen, Petitioner, 131 U.S. 176, 185.

Petitioner makes no statement or contention that the sentence imposed upon him for violation of Count V is, in any manner, in excess of that court's jurisdiction, and his discharge under writ of habeas corpus is thereby precluded.

THE SEVERAL STATUTES UNDER WHICH PETITIONER WAS SENTENCED ARE DISTINCT IN PURPOSE AND FUNCTION AND CONSECUTIVE SENTENCES MAY BE IMPOSED FOR SIMULTANEOUS VIOLATION THEREOF.

Section 277 of Title 18, United States Code, upon which Count III of the instant indictment was based, provides a maximum term of imprisonment of ten years. The petitioner was sentenced to serve two years for violation of that statute.

The charge embraced by the statute and said Count III is that the petitioner knowingly possessed a certain number of counterfeit *silver* coins, with intent to defraud. That section of the statute and Count III are distinguishable from Section 278, Title 18, United States Code, and Count IV of the indictment, respectively, in that the latter statute and charge relate to the knowing possession of counterfeit *minor* coins, with intent to defraud. Section 278, Title 18, United States Code provides a maximum term of imprisonment of three years for violation thereof, and the petitioner was sentenced to serve two years for that act.

Both Section 277 and Section 278 of Title 18, United States Code may be readily distinguished from Section 283, Title 18, United States Code, which forms the basis of the charge as laid in Count V of the indictment in question. A comparative reading of Counts III, IV and V of the indictment, and the statutes upon which they are based, patently reveals that, whereas the element of intent must be charged and proven in respect to said Counts III and IV, no such necessity exists with respect to Count V, where the element of intent need not be charged or proven.

Baender v. Barnett, 255 U.S. 224, 227;

Baender v. United States, (CCA9) 260 Fed. 832, 834, cert. den. 252 U.S. 586.

The two cases last cited clearly point out that the lawful and knowing possession of prohibited molds or dies constitutes the criminal offense prohibited by Section 283, Title 18, United States Code. Admitting for the purpose of argument only that petitioner's contention might be correct if we were considering only Counts III and IV of the indictment, which involved the simultaneous possession of counterfeit silver and minor coins, petitioner's contention entirely overlooks

the distinguishing features of Section 283, Title 18, United States Code.

The reasoning employed in petitioner's brief would lead to the result that the longer terms of imprisonment provided by Sections 283 and 277 of Title 18, United States Code, as compared to Section 278 of Title 18, United States Code, could always be avoided by one violating those laws, if he were merely to be certain to have on his person and in his possession a few counterfeit *minor* coins at the same time he possessed counterfeit *silver* coins, and molds and dies for the making of counterfeit silver coins. Upon being indicted and found guilty of all such offenses, that person could then, under petitioner's reasoning, only be sentenced to serve the maximum term provided by Section 277 of Title 18, United States Code: that is, two years.

That such construction is not in harmony with the apparent intent of the Congress in enacting the several measures and providing for varying terms of imprisonment, admits of no argument.

In the case of *Johnston v. Lagomarsino*, (CCA9) 88

Fed. (2d) 86, 87, the court quotes from the decision of the *United States v. Lacher*, 134 U.S. 624, as follows:

“It appears to me * * * that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.”

Following that rule of construction and the further ruling contained in the last cited case on page 88 of that decision,

“ * * * every presumption must be indulged in favor of the judgment and sentence.”

It appears that the construction contended for by appellee, and approved by the District Court herein, is correct.

NONE OF THE AUTHORITIES RELIED UPON BY APPELLANT FURNISH GROUNDS FOR HIS DISCHARGE BY WRIT OF HABEAS CORPUS.

In *United States v. Howell*, (D. C. Cal.) 65 Fed. 402, 407, the point decided was that an indictment charging possession of counterfeit money, containing several separate counts, each relating to a different denomination of coin, was valid and sufficient. No question there arose as to what effect the simultaneous possession by the defendant of molds and dies for the making of counterfeit silver coins would have had in relation to the charges there involved. No judgment or sentence was before that court for decision.

Logan v. United States, (CCA) 123 Fed. 291, merely holds that one may not be doubly convicted. That is, convicted of both forging a national bank note and forging the signature of identically the same note. That is patently correct.

We have no quarrel with the general rules which appellant has quoted from the cases of

Hans Neilsen, Petitioner, 131 U.S. 176, 182;
In re Coy, 127 U.S. 731, 758,

but point out that petitioner's quotation (p. 4, appellant's brief), purportedly from *Ex parte Seibold*, 100 U.S. 371, is derived from the case of *In re Coy*, supra.

Many of the cases relied upon by petitioner are concerned with the established rule that one may not be required to serve consecutive sentences upon conviction for burglary with intent to commit larceny, and of larceny committed at the same time and as part of a continuous criminal act. The cases cited by petitioner from the various state court jurisdictions, while perhaps persuasive, are not controlling, and no reference is here made to them because the matters here in question have been previously ruled upon by the federal courts.

Such a federal court ruling upon the point just above mentioned is found in *Halligan, Warden v. Wayne*, (CCA) 179 Fed. 112, to the effect that the defendant could not be sentenced separately for burglary or larceny committed as part of a continuous offense. In such case proof of one of those offenses so committed necessarily imports and includes proof of the other. That may not be said of the three offenses which are here in question.

Petitioner places reliance upon *Munson v. McCloughry*, (CCA8) 198 Fed. 72. That decision goes further than petitioner has indicated, and at page 77 of the decision its holding is in line with appellee's contention that only "the excess of a sentence beyond the jurisdiction of the court which renders it is void", and by inference holds that where a prisoner has not satisfied the valid portion of the sentence imposed upon him, he is not entitled to be discharged. The same may be said of *Ex parte Lange*, 85 U.S. 163.

The case of *Michigan Trust Co. v. Ferry*, (CCA8) 175 Fed. 667, 677, cited by petitioner, is a civil matter in which, by reason of failure of proper service and pleading, it was held that the court acted beyond its jurisdiction in certain respects. It has not been shown how that decision aids the petitioner here.

In *Mackey v. Miller*, (CCA9) 126 Fed. 161, cited by petitioner, it was held that those imprisoned were so confined under a sentence rendered upon a state of facts constituting *no offense* against the government, that the sentence was void on its face, and habeas corpus was the proper remedy. That case is most readily distinguishable from the instant matter.

Petitioner further relies upon *Ex parte Peeke*, (D.C.) 144 Fed. 1016, and *Stevens v. McClaughry*, (CCA8) 207 Fed. 18. In each of the two cases last cited it was pointed out that only the excess of a sentence imposed, which is beyond the jurisdiction of the court rendering it, is void.

Further reliance is placed by petitioner upon *Ball-erini v. Aderholt*, (CCA5) 44 Fed. (2d) 352, wherein it is held that separate counts in an indictment based upon one sale of heroin charged but one offense. Appellant quotes therefrom the established rule, namely, that in determining what is the same offense, the test applied is whether, if what is set out in the second indictment (or count) had been proved under the first, there could have been a conviction. Certainly the petitioner cannot here contend that sufficient proof that he possessed counterfeit *silver* coins with intent to defraud, would be adequate to prove that he possessed molds and dies for the making of counterfeit silver coins, or vice versa. Obviously, the three counts here in question do not charge the same offense, and proof of each of them must be based upon different and distinctive facts.

CONCLUSION

The District Court, after hearing this matter, concurred in appellee's foregoing conclusions. It is respectfully submitted that the order of the District Court sustaining appellee's demurrer and denying the relief herein sought was correct, and should be affirmed; that the petitioner has not completed service of a sentence lawfully imposed upon him by the United States District Court for the Southern District of California, Central Division; that petitioner is now lawfully confined, and is not entitled to be discharged.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

OLIVER MALM,
*Assistant United States
Attorney.*

Attorneys for Appellee.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY EARL DUNLAP,

Appellant,

vs.

E. B. SWOPE, Warden of the United
States Penitentiary at McNeil Island,
Washington,

Appellee.

Answering Brief of Appellant

FILED

JAN 27 1933

HENRY EARL DUNLAP,
Lock Box 500,
Steilacoom, Washington,
Attorney for Appellant.

PAUL P. O'BRIEN,
CLERK

In the
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No. 8668

Answering Brief of Appellant

In lieu of oral argument, appellant herewith submits argument answering appellee's brief:

THE QUESTIONS INVOLVED

The appellee sets forth a statement of the questions involved, on page 4 of his brief. The appellant must take exception to that statement, and restate the questions that are involved, viz:

1. Is whether petitioner is entitled to be released from confinement when he has served the legal sentence imposed upon him.

2. Whether three consecutive sentences may be imposed for a single offense—singular in intent and fact.

ARGUMENT

The sentence imposed upon petitioner is vague and doubtful. The appellee interprets the judgment to read: “The sentence of six years, on Count 5, to be served first.” The judgment states that the six year sentence on Count 5, shall not start until the expiration of the two year sentence on Count 4; and is the last of the three sentences to be served.

The appellee makes no contention that any of the three sentences are in excess of the limitations of time, as prescribed by law. His contention is solely; that the trial court exceeded its jurisdiction in sentencing him in three separate instances for one offense.

The trial court might have legally sentenced petitioner to a term of ten years on Count 3. The sentence of the trial court on Count 3, was for a period of two years. That, then, was the intent of the trial court.

The determination of the offenses is by the facts and pleadings; the lesser crime was a part of the greater; and such argument as advanced by appellee on page 11 of his brief is not applicable.

There can be no evasion in such a manner as described by him; unless the court so wishes it, by reducing the charge from possession of silver coins, to possession of minor coins.

Petitioner contends that but one offense, with but one intent and one set of facts, were set forth in the

indictment. It is essential in all court procedure, that but one indictment can be brought for one offense—that the determination of the offense is made by the determination of the essential elements which go to make up the offense. It is well established precedent that where only one set of essential elements exist, where several crimes are charged; but one set of the offenses is punishable. With the essential elements of the offense in question being singular, it is contrary to established practice that the petitioner be made to serve several sentences. The petitioner bases that allegation on the law, as it is set out in the following instances by courts of record in the United States:

“In creating an offense, the Legislature may define it by a particular description of the act or acts constituting it, or may define it as any act which produces—or is reasonably calculated to produce—a certain defined or described result. Where a person convicted of larceny, cannot later be tried for robbery; when larceny is an essential element of robbery. *STATE vs. LEWIS*, 9 N. C. 98; Am. Dec. 741.

WHERE AN INDICTMENT, THOUGH CONSISTING OF SEVERAL COUNTS, IS FOUNDED ON A SINGLE TRANSACTION: THE VERDICT IS A UNIT AND LAYS THE FOUNDATION FOR BUT A SINGLE JUDGMENT. THE JUDGMENT, THOUGH PRO-
NOUNCED BY THE JUDGE, IS NOT HIS DETERMINATION, BUT THAT OF THE LAW; WHICH DEPENDS NOT ON THE ARBITRARY OPINION OF THE JUDGE,

BUT ON THE SETTLED AND IRREVERSIBLE PRINCIPLES OF JUSTICE.

Some authorities—in absence of statute, have no right to give consecutive sentences. *Ex Parte McGUIRE*, 135 Cal. 339, 67 Pac. 327. 87 A. S. R. 105, *PEOPLE vs. LISCOMB*, 60 N. Y. 559.”

The indictment as a pleading, sets forth the theories of the pleader; but the pleadings are only memorandum, from which the facts in law are to be ascertained. The pleader in this instance, set forth his pleadings *in toto*; alleging a series of offenses. The facts, as the pleadings testify, are, that but one single continuous offense was committed. The law is conclusive; a series of consecutive sentences in the judgment from such an indictment, is contrary to statute and therefore illegal. As witness the findings in the following:

“Prosecution for any part of a single crime, bars any further prosecution for the whole, or any part of the same crime; and the Government cannot split up one conspiracy and prosecute different indictments therefore. *U. S. vs. WEISS*, 293 Fed. 992.

The term ‘Same Offense,’ in Constitutional prohibition against double jeopardy, signifies same criminal act, or omission, rather than same offense *eo nomine*. (Const. Art. 2, #2); and the State, after electing to prosecute an offense in one of its aspects cannot prosecute for same criminal acts, under color of another name. *HUNTER vs. STATE*, Okl. Cr. App., 277 Pac. 952.

Where it is necessary in proving one offense, to prove every essential element of another, growing

out of the same act, conviction on former is bar to prosecution for the latter. (U. S. C. C. A., Mich.) KRENCH vs. UNITED STATES, 42 Fed. (2d) 354.

Conviction or acquittal, of greater offense, is bar to subsequent prosecution for lesser offense included in the greater. STATE vs. PECK, 146 Wash. 101, 261 Pac. 779, followed in STATE vs. CHRISTOPH, 147 Wash. 698, 256 Pac. 1119.

A judgment on an indictment alleging in general terms every fact necessary to constitute offense, is bar to subsequent prosecution for any offense which could have been proved under the indictment. Acquittal of automobilist injuring two girls simultaneously, for manslaughter, bars prosecution for atrocious assault on the other. STATE vs. COSGROVE,, N. J., 135 A. 871, 132 A. 231."

To pursue the course of reasoning to a conclusion, the point seems well established that the pleadings may set forth any number of separate counts. In the case at bar, the pleadings reveal that each count of the indictment was based upon a single act, which was an essential element in proving the charge of counterfeiting. The crime was of singular intent, and a continuous offense; inseparable in any part, from any part of the other. Therefore, the series of consecutive sentences in the judgment on such an indictment is irregular, and contrary to the irreversible principles of justice.

It seems to be the practice of the Legislative body, to call offenses by a variety of names and prohibit each

named offense, and provide punishment thereof. This made it necessary for the courts to render the interpretations set forth in the foregoing. One decision in particular, has been generally accepted by the courts, as the law in like cases; viz:

“A criminal intent to commit larceny of property of the Government, is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into—or breaks into—a Post Office building, with intent to commit larceny therein and at the same time, commits the larceny, his criminal intent is one and it inspires his entire transaction, which is itself, in reality, but a single continuing act. It seems to be unauthorized, inhuman and unreasonable to divide such a single intent, and such a criminal act (42 L. R. A., N. S.) into two or more separate offenses and to inflict separate punishments on the various acts or transaction. Such as one for breaking—or the attempt to break—with criminal intent; another for larceny—with the same intent. Or, such as, one for the attempt to break; a second for the breaking; a third for the entering; a fourth for the taking of stamps; a fifth for the taking of other property; a sixth for the conversion of the property, and a seventh for carrying it away; all with the same criminal intent. And there is evidently no limit to the number of offenses into which criminal transaction, inspired by a single criminal intent, may be divided.

If this rule of division and punishment is once firmly established, the theory that such an act and

intent could be punished as two separate offenses, has taken its rise in the Federal Courts in the decision of Circuit Judge McCrary, in *Ex Parte PETERS* (C. C.) 2 McCrary 403, 12 Fed. 461. At that time the Supreme Court of Connecticut, held in *WILSON vs. STATE*, 24 Conn. 57; that a conviction of larceny at the same time a burglary was committed, constituted no defense to a charge of the burglary. Chief Justice Waite, in an able opinion which has commended itself to the judgment of many courts, dissented from this conclusion and declared that: **WHENEVER, IN ANY CRIMINAL TRANSACTION; A FELONIOUS INTENT IS ESSENTIAL TO RENDER IT A CRIME, AND WITHOUT PROOF OF WHICH, NO CONVICTION CAN BE HAD; TWO INFORMATIONS FOUNDED UPON THE SAME INTENT, CANNOT BE MAINTAINED."**

It is respectfully submitted that the appellant was indicted on several counts for but one offense. No refutation of this allegation has been presented to this court. It is but meet and just, that appellant be discharged, as prayed for, from this illegal imprisonment and restraint.

HENRY EARL DUNLAP,
Attorney for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM FRANKLIN La SHAGWAY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Nevada.

FILED

NOV 19 1937

PAUL H. GIBSON

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM FRANKLIN La SHAGWAY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Nevada.

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

E. P. CARVILLE, Esq.,
United States Attorney,
Federal Building, Reno, Nevada.

THOMAS O. CRAVEN, Esq.,
Assistant United States Attorney,
Carson City, Nevada,
For the Appellant, United States
of America.

No Attorney of Record for Defendant. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

[Endorsed]: Filed April 29th, 1937.

In the District Court of the United States of
America, in and for the District of Nevada.

No. 9544.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM FRANKLIN La SHAGWAY,

Defendant.

INDICTMENT FOR VIOLATION.

Sec. 80, T. 18, U. S. C. A.

United States of America,
District of Nevada—ss.

Of the February, 1937, Term of the District Court
of the United States of America in and for the Dis-
trict of Nevada;

The Grand Jurors of the United States of
America, duly chosen, selected and sworn, within
and for the District of Nevada, in the name and by
the authority of the United States of America, upon
their oaths do find and present:

That on or about the 27th day of November, 1936,
at Reno, Washoe County, State and District of
Nevada, and within the jurisdiction of this court,
the above named defendant, William Franklin La-
Shagway, did then and there unlawfully, know-
ingly, and wilfully, make and present a claim upon
and against the Government of the United States,

for payment of a sum of money, to-wit: Two Hundred Thirty-four Dollars [2] Forty-four Cents (\$234.44), knowing such claim to be false, and fictitious, and fraudulent; that said false claim consisted of that certain writing, in affidavit form, subscribed and sworn to by defendant before a notary public at Reno, State and District of Nevada, on the 27th day of November, 1936, and stating that defendant had not received check number 104,893, dated April 10, 1931, payable to the order of defendant, in the sum of Two Hundred Thirty-four Dollars Forty-four Cents (\$234.44) drawn by L. S. McCracken, Special Disbursing Agent, Symbol number 99-151, and representing the amount of a loan on defendant's Adjusted Service Certificate, and making claim for said amount of Two Hundred Thirty-four Dollars Forty-four Cents (\$234.44), defendant then and there knowing that said claim was false and fraudulent; that said claim was made and presented by said defendant to General Accounting Office, of the United States Government, at Washington, D. C.; that at the time defendant made and presented said false claim, defendant then and there well knew that defendant had in truth and in fact received said check, payable to the order of defendant, in the sum of Two Hundred Thirty-four Dollars Forty-four Cents (\$234.44), had endorsed the same, and had received the proceeds of said check for defendant's use and benefit.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

E. P. CARVILLE,

United States Attorney.

By MILES N. PIKE,

Asst. U. S. Attorney.

A true bill:

P. L. NELSON,

Foreman. [3]

[Title of Court and Cause.]

DOCKET ENTRIES.

1. Indictment filed April 29, 1937.
2. Record on Concurring Grand Jurors filed April 29, 1937.
3. Bench Warrant issued April 29, 1937.
4. Bench Warrant returned with Marshal's Return—Unable to find the defendant within the District, filed April 29, 1937.
5. Arraigned and plea of guilty entered May 8, 1937.
6. Sentenced to One (1) Year in Federal Prison Camp No. 10, Tucson, Arizona, on May 8, 1937, and the Court reserves jurisdiction, during the Term, to consider any modification of the sentence and also to consider probation; defendant remanded.
7. Commitment issued, May 8, 1937.

8. Warrant of Removal out of the Southern Division, Northern District of California, filed May 10, 1937.

9. Commitment returned and filed May 26, 1937 with Marshal's Return as follows: Executed May 8, 1937 by delivering defendant to Sheriff, Washoe County, Nevada, and on May 20, 1937 by delivering defendant to Superintendent, Federal Prison Camp No. 10, Tucson, Arizona.

10. Order filed and entered modifying sentence and granting defendant probation for the remainder of term of sentence and for one year thereafter, filed June 7, 1937.

11. Notice of Appeal filed by U. S. Attorney, June 10, 1937.

12. Mandate of U. S. Circuit Court of Appeals dismissing appeal herein filed June 22, 1937.

13. Petition for Appeal filed September 1, 1937.

14. Assignment of Errors filed September 1, 1937.

15. Praecipe filed September 1, 1937.

16. Order granting Appeal filed September 2, 1937.

17. Issuing Citation on Appeal (Handed Marshal for service) on September 14, 1937. [4]

[Title of Court and Cause.]

MINUTES OF COURT, SATURDAY
MAY 8, 1937.

This defendant appeared this day in the custody of the Marshal, informed the Court he did not desire the services of an attorney at this time as he is fully advised as to the action he wishes to take, and thereupon was duly arraigned upon the indictment herein as required by law. He declared his true name to be William Franklin La Shagway, entered his plea of guilty as charged in the indictment, waived time and requested that sentence be passed upon him at this time. The case report was read. Mr. W. C. Fisk, Secret Service Agent, made a statement of the case. Thereupon the Court pronounced judgment as follows, addressing the defendant: "In consideration of the law and the premises, it is hereby ordered and adjudged that you be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a jail for the period of One (1) year from and after this date. The Court retains jurisdiction during the term to consider any modification of the sentence imposed upon you, and also to consider probation." The defendant is remanded to the custody of the Marshal for the execution of his sentence. [5]

[Title of Court and Cause.]

JUDGMENT.

This defendant appeared this day, pleaded guilty as charged in the indictment, waived time and requested that sentence be passed upon him at this time; thereupon the Court pronounced judgment as follows, addressing the defendant:

You, William Franklin La Shagway, have been indicted by the Grand Jury, impaneled in and by this Court for the crime of having violated Section 80, Title 18, U. S. C. A. by unlawfully, knowingly, and wilfully making and presenting a claim upon and against the Government of the United States, for payment of a sum of money, to-wit: Two Hundred Thirty-four Dollars and Forty-four Cents (\$234.44), knowing such claim to be false, and fictitious, and fraudulent; said crime having been committed on or about the 27th day of November, 1936, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a jail for the period of one (1) year from and after this date. The Court retains jurisdiction during the term, to consider any modi-

fication of the sentence imposed upon you, and also to consider probation.

Dated and entered May 8, 1937.

Attest:

O. E. BENHAM,

Clerk.

By M. R. Grubic,

Deputy. [6]

[Endorsed]: Filed May 26, 1937.

[Title of Court and Cause.]

COMMITMENT.

The President of the United States of America:
To the Marshal of the United States for the District of Nevada and to the Superintendent of the Federal Prison Camp No. 10 at Tucson, Arizona, Greeting:

Whereas, at the May term of said Court, 1937, held at Reno, in said district and division, to-wit, on May 8th, 1937, William Franklin La Shagway was sentenced by said Court, upon his plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a (Jail) for and during the term and period of One (1) Year beginning on the date on which he is received at the (Jail) for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence

shall begin on the date on which he is received at such jail or other place of detention; for his violation of Section 80, T. 18, U. S. C. A. by unlawfully, knowingly and wilfully, made and present a claim upon and against the Government of the U. S., for payment of a sum of money, to-wit: Two Hundred Thirty-four Dollars Forty-four Cents (\$234.44) knowing such claim to be false, etc., said crime having been committed on or about the 27th day of November, 1936, at Reno, Nevada;

And Whereas, the Attorney General of the United States has designated the Federal Prison Camp No. 10 at Tucson, Arizona, as the place of confinement where the sentence of said William Franklin La-Shagway shall be served;

Now, this is to command you, the said Marshal, forthwith to take said William Franklin La Shagway and he safely transport to said Federal Camp No. 10 and he there deliver to said Superintendent of said Federal Prison Camp No. 10 with a copy of this writ; and you, the said Superintendent, to receive said William Franklin La Shagway and he keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

Witness the Honorable Frank H. Norcross, Judge of said Court, and the seal thereof, affixed at Carson City, in said district, this 8th day of May, 1937.

[Seal]

O. E. BENHAM,

Clerk.

J. P. FODRIN,

Deputy Clerk. [7]

RETURN.

I have executed the within writ in the manner following, to-wit: On May 8th, 1937 I delivered said William Franklin La Shagway to the Sheriff of the Washoe County Jail temporarily pending transfer to the institution herein designated for the service of sentence, and on May 20th, 1937, I delivered said William Franklin La Shagway to the Superintendent of Federal Prison Camp No. 10 at Tucson, Arizona, together with a copy of this commitment.

LELAND S. BRAWNER,

United States Marshal.

By GEO. E. TURPIN,

Deputy.

Criminal Docket No. 9070.

[Endorsed]: Filed June 7th, 1937.

In the District Court of the United States of
America, in and for the District of Nevada.

No. 9544.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM FRANKLIN LaSHAGWAY,

Defendant.

ORDER MODIFYING SENTENCE AND
GRANTING PROBATION.

The above named Defendant on May 8, 1937, having entered a plea of guilty to the charge in the indictment returned against him and thereupon the Court imposed sentence that he be imprisoned for the period of one year from and after the date of sentence, subject to the reservation that the Court retains jurisdiction during the term to consider any modification of the sentence so imposed and also to consider probation, now upon good cause shown it is

Ordered that said defendant be, and he hereby is, granted release on probation for the remainder of the term of sentence so imposed from and after June 14, 1937, such probation, subject to the further order of the Court, to be for the remaining term of sentence and for one year thereafter, said Defendant on release to report forthwith to the Probation Officer of this District.

Dated this 7th day of June, 1937.

FRANK H. NORCROSS,

District Judge. [8]

[Endorsed]: Filed Sept. 1st, 1937.

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes the Plaintiff, the United States of America, by E. P. Carville, United States Attorney for the District of Nevada, and prays that an appeal be granted to the United States Circuit Court of Appeals for the Ninth Circuit from an order herein entered granting defendant probation—such order being entered after the defendant had been sentenced, and after he had been committed for the execution of the sentence, and had served a part thereof; and in support of such appeal files herewith its assignment of errors.

E. P. CARVILLE,

United States Attorney.

By THOMAS O. CRAVEN,

Asst. U. S. Attorney. [9]

[Endorsed]: Filed Sept. 2nd, 1937.

[Title of Court and Cause.]

ORDER GRANTING APPEAL.

In consideration of the petition filed herein by the plaintiff, the United States of America, and good cause appearing therefor, it is by the Court this 2nd day of September, 1937,

Ordered that an appeal be allowed to the Circuit Court of Appeals for the Ninth Circuit.

FRANK H. NORCROSS,

District Judge. [10]

[Endorsed]: Filed Sept. 1st, 1937.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the Plaintiff, the United States of America, by E. P. Carville, United States Attorney for the District of Nevada, and in support of the petition for appeal herein filed this date assigns the following errors:

I.

That the Judge of said Court, and/or said Court, had no authority to make an order placing the defendant upon probation for the reason that defendant had commenced to serve his sentence under a judgment rendered herein on May 8, 1937, sentencing him to serve one year in jail.

II.

That the Judge of said Court, and/or said Court, exceeded its jurisdiction in making said order of probation for the same reason as set forth in the preceding paragraph.

III.

That the Judge of said Court, and/or said Court, lost jurisdiction to make said order of probation for the same reason as set forth in paragraph 1 hereof.

Respectfully submitted,

E. P. CARVILLE,

United States Attorney.

By THOMAS O. CRAVEN,

Assistant U. S. Attorney. [11]

[Endorsed]: Filed September 1st, 1937.

[Title of Court and Cause.]

PRAECIPE.

To Honorable O. E. Benham, Clerk of the Above
Entitled Court:

Please prepare and certify record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled action and include therein the following papers and documents:

1. Docket Entries.
2. Indictment.
3. Record of Arraignment.
4. Record of Plea to Indictment.
5. Record of Adjudication of Guilt.
6. Judgment.
7. Commitment.
8. Order of Probation.
9. Petition for Appeal.
10. Order Allowing Appeal.
11. Assignment of Errors.
12. Citation on Appeal.
13. And this Praecipe dated September, 1937.

E. P. CARVILLE,

United States Attorney for Nevada.

By THOMAS O. CRAVEN,

Asst. U. S. Attorney. [12]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of The United States vs. William Franklin La Shagway, said case being No. 9544 on the criminal docket of said Court.

I further certify that the attached transcript, consisting of 16 typewritten pages numbered from 1 to 16, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the Praecipe filed by the Appellant, which is made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk in the City of Carson, State and District aforesaid.

And I further certify that the original Citation issued in this case is hereto attached.

Witness my hand and the seal of said United States District Court this 7th day of October, A. D. 1937.

[Seal]

O. E. BENHAM,
Clerk, U. S. District Court. [13]

[Endorsed]: Filed Sept. 30th, 1937.

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States to William Franklin La Shagway, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, for the District of the State of Nevada, and within said Ninth Circuit, within thirty (30) days from the date hereof, pursuant to an order of the District Court first above named, allowing an appeal to the plaintiff above named and filed in the office of the Clerk of said District Court in and for the District of Nevada in an action wherein the United States of America is plaintiff and appellant, and you, the above named defendant, are appellee, to show cause, if any there be, why the order granting you probation after you had been sentenced and commenced to serve the sentence so imposed, as in said [15] order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Norcross, Judge of the District Court of the United States for the District of Nevada, this 14th day of September, 1937, in the year of the Independence of the United States, the one hundred and sixty-second.

FRANK H. NORCROSS,

District Judge.

Attest:

[Seal]

O. E. BENHAM,

Clerk, District Court of Nevada.

United States of America,
District of South Dakota.

I hereby certify and return that within Citation on Appeal came into my hands for service on the 18th day of September, 1937, and that after a due and diligent search, I am unable to find the within-named defendant, William Franklin La Shagway, within my District.

C. W. ROBERTSON,
United States Marshal.
By J. H. JOHNSON,
Deputy.

Expenses of Deputy...\$11.30

\$11.30

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of Calif.—ss.

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named William Franklin La Shagway by handing to and leaving a true and correct copy thereof with William Franklin La Shagway personally at Oakland in said District on the 29th day of September, A. D. 1937.

GEORGE VICE,

U. S. Marshal.

By J. R. CUNNINGHAM,

Deputy.

Marshal's Fees

Travel\$2.80

Service 2.00

\$4.80 [14]

[Endorsed]: No. 8677. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. William Franklin La Shagway, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed October 8, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals
For the Ninth Circuit. 23

ARCHIE POULAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Northern Division

FILED

JAN - 5 1933

PAUL F. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARCHIE POULAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
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Northern Division

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NAMES AND ADDRESSES OF COUNSEL

Mr. EDWARD H. CHAVELLE,

Attorney for Appellant,

315 Lyon Bldg.,

Seattle, Washington.

Messrs. J. CHARLES DENNIS and G. D. HILE,

Attorneys for Appellee,

222 Post Office Bldg.,

Seattle, Washington. [1*]

United States District Court, Western District of
Washington, Northern Division

November Term, 1936

No. 44313

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARCHIE POULAS, alias James Melton Miller,
Defendant.

INDICTMENT

United States of America,
Western District of Washington,
Northern Division—ss.

Violation Sections 1287 and 1441, Title 26, U. S.
C. A.

The grand jurors of the United States of America
being duly selected, impaneled, sworn, and charged

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I

That Archie Poulas, alias James Melton Miller, whose true and full name is to the grand jurors unknown, on or about the seventeenth day of February, in the year of our Lord one thousand nine hundred thirty-seven, in the vicinity of premises located in the 3100 block on Western Avenue, at the City of Seattle, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court, and within the Internal Revenue Collection District of Washington then and there being, did then and there knowingly, wilfully, unlawfully and feloniously remove and aid and abet in the removal of, to-wit, Five (5) Gallons of Whiskey on which the tax due the government of the United States had not then and there been paid, to a place other than a bonded warehouse provided by law and to the grand jurors unknown, and did then and there conceal and aid in the concealment of the said whiskey so removed; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: [2]

COUNT II

That Archie Poulas, alias James Melton Miller, whose true and full name is to the grand jurors

unknown, on or about the seventeenth day of February, in the year of our Lord one thousand nine hundred thirty-seven, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court, and within the Internal Revenue Collection District of Washington then and there being, did then and there knowingly, wilfully, unlawfully and feloniously remove, deposit and conceal, with intent to defraud the United States of the internal revenue taxes due thereon as fixed by law, in the vicinity of premises located in the 3100 block on Western Avenue, at the City of Seattle, Washington, to-wit: Five (5) Gallons of Whiskey contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. CHARLES DENNIS

United States Attorney

G. D. HILE

Assistant United States Attorney

[Endorsed]: A True Bill.

GLEN McLEOD,

Foreman

J. CHARLES DENNIS

Dismissed. J. C. B.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court Feb. 27, 1937. Edgar M. Lakin, Clerk. By Truman Egger, Deputy. [3]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA

Now on this 8th day of March, 1937, Gerald Shucklin, Assistant United States District Attorney appearing for the plaintiff, the defendant Archie Poulas, alias James Melton Miller, accompanied by his counsel E. H. Chavelle, Esq. comes into open court for arraignment and answers that his true name is Archie Poulas. He waives the formal reading of the Indictment and now enters a plea of not guilty to the charges of the Indictment. The cause is now ordered placed on the assignment calendar.

Journal No. 24, page 528. [4]

[Title of Court and Cause.]

PETITION TO SUPPRESS

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

Archie Poulas of Seattle, King County, Washington, respectfully shows:

I.

Tha on the 17th day of February, 1937 on Western Avenue in the City of Seattle, County of King, State of Washington, your petitioner was sitting in a sedan Oldsmobile automobile belonging to one, Anderson, and that Internal Revenue Agents, E. Kelly and N. F. Strubin, approached said car without any search warrant or any warrant whatso-

ever and proceeded to search the same and found in the automobile of said Anderson, something that they claimed was contraband and that without a warrant searched and seized from the said car the said article and seized said automobile and arrested your petitioner.

II.

That your petitioner is not engaged in any business of any kind pertaining to or connected with the transportation of or possession of intoxicating liquors and that affiant was acting in a lawful and orderly manner and was merely sitting in said car waiting for the said Anderson to return but the said officers did not pretend to have a legal right to search said car or seize from the said automobile any of the articles therein contained but without authority and in violation of the constitutional rights of the petitioner they seized and took from said automobile [5] said articles which they intend to use against the said petitioner in the trial of this case.

Petitioner, therefore prays that a rule be made requiring the United States attorney for the Western District of Washington, Northern Division, to show cause before this Court why said search warrant should not be quashed and for nothing holden and why the said District Attorney and Internal Revenue Department should not be restrained from making any use of the said articles seized by them

and for such other and further relief as to the Court shall seem just.

ARCHIE POULAS

Petitioner

EDWARD H. CHAVELLE

Attorney for Petitioner

315 Lyon Bldg.

Seattle, Washington

United States of America,
Western District of Washington,
Northern Division—ss.

Archie Poulas, being first duly sworn, on oath, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read the same, knows the contents thereof and believes the same to be true.

ARCHIE POULAS

Subscribed and sworn to before me this 26th day of August, 1937.

[Seal]

EDWARD H. CHAVELLE

Notary Public in and for the State of Washington,
residing at Seattle. [6]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF PETITION
TO SUPPRESS

United States of America,
Western District of Washington,
Northern Division—ss.

Archie Poulas, being first duly sworn, on oath,
says:

That he has read the petition to suppress herein,
knows the contents thereof and believes the same to
be true; that said affiant especially refers to and
by such reference makes the same a part of this
affidavit;

That on the 17th day of February, 1937, affiant
was sitting in a sedan Oldsmobile automobile be-
longing to one, Anderson, on Western Avenue, in
the City of Seattle, County of King, State of Wash-
ington when two internal revenue agents, namely,
E. Kelly and N. F. Strubin, approached the said
car without any search warrant or any warrant
whatsoever and proceeded to search the said car
and found in the automobile of said Anderson, some-
thing which they claimed was contraband and with-
out a warrant searched and seized from the said
car the said article and seized said automobile and
arrested this affiant; that at the time of said search
and seizure affiant was acting in an orderly and
lawful manner sitting in said car waiting for the
said Anderson to return.

ARCHIE POULAS

Subscribed and sworn to before me this 26th day of August, 1937.

[Seal] EDWARD H. CHAVELLE
Notary Public in and for the State of Washington,
residing at Seattle.

Received a copy of the within petition this 27th day of Aug., 1937.

J. CHARLES DENNIS

Attorney for Pltf.

[Endorsed]: Filed Aug. 27, 1937. [7]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SUPPRESS

United States of America,
Western District of Washington,
Northern Division—ss.

N. F. Strubin, being first duly sworn, on oath deposes and says: That he is an Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States, and makes this affidavit on behalf of the United States of America.

That on February 17, 1937, I had information from a source heretofore found to be very reliable in regard to illicit liquor transactions, that the defendant Archie Poulas was to make a delivery of untaxpaid whiskey on the afternoon of said date to a frame dwelling house located on the westerly side of Western Avenue, Seattle, Washington, in the 3100 block, and that said defendant Archie Poulas

would be driving a 1934 brown Oldsmobile Sedan, Washington License A-25-809.

That Investigator Kelly and I proceeded at about 3:30 P. M. on said date to Queen Anne Avenue in Seattle, Washington, near the intersection of Western Avenue and Denny Way, and observed this intersection. At about 4:15 P. M. on said date I saw the Oldsmobile Sedan above [8] described, being driven by Archie Poulas, pass in front of me and turn into Western Avenue and stop directly in front of said frame house where we had been informed the delivery of untaxpaid whiskey was to be made. Archie Poulas looked around several times and in the meantime Investigator Kelly and I proceeded in the government car and approached said Oldsmobile Sedan and stopped alongside said automobile.

Thereupon Investigator Kelly explained to Poulas that he was a federal officer and asked the said Archie Poulas what he had in the car. Poulas replied that he had moonshine in the car. After hearing the reply of the said Archie Poulas I lifted up a blanket in the rear of said Oldsmobile Sedan and found five one-gallon glass jugs in a gunny sack, each jug containing one gallon of untaxpaid moonshine whiskey. Thereupon Investigator Kelly examined the contents of said gunny sack which I had removed from said Oldsmobile Sedan and placed the defendant Archie Poulas under arrest.

That prior to the time the foregoing facts occurred I knew that Poulas had a reputation for being a persistent violator of the Internal Revenue laws of the United States relating to liquor.

N. F. STRUBIN

Subscribed and sworn to before me this 1st day of September, 1937.

[Seal]

S. COOK,

Deputy Clerk, U. S. District Court, Western
District of Washington.

Received a copy of the within affidavit this 7th day of Sept., 1937.

EDWARD H. CHAVELLE

Attorney for def.

[Endorsed]: Filed Sep. 7, 1937. [9]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SUPPRESS

United States of America,
Western District of Washington,
Northern Division—ss.

E. T. Kelly, being first duly sworn, on oath deposes and says: That he is an Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States, and makes this affidavit on behalf of the United States of America.

That on February 17, 1937, I had information from a source heretofore found to be very reliable in regard to illicit liquor transactions, that the defendant Archie Poulas was to make a delivery of untaxpaid whiskey on the afternoon of said date to a frame dwelling house located on the westerly side of Western Avenue, Seattle, Washington, in the

3100 block, and that said defendant Archie Poulas would be driving a 1934 brown Oldsmobile Sedan, Washington License A-25-809.

That Investigator Strubin and I proceeded at about 3:30 P. M. on said date to Queen Anne Avenue in Seattle, Washington, near the intersection of Western Avenue and Denny Way, and observed this intersection. At about 4:15 P. M. on said date I saw the Oldsmobile Sedan above [10] described, being driven by Archie Poulas, pass in front of me and turn into Western Avenue and stop directly in front of said frame house where we had been informed the delivery of untaxpaid whiskey was to be made. Archie Poulas looked around several times and in the meantime Investigator Strubin and I proceeded in the government car and approached said Oldsmobile Sedan and stopped alongside said automobile.

Thereupon I explained to Archie Poulas that I was a federal officer and asked the said Archie Poulas what he had in the car. Poulas replied that he had moonshine. After hearing the reply of the said Archie Poulas Investigator Strubin lifted up a blanket in the rear of said Oldsmobile Sedan and found five one-gallon glass jugs in a gunny sack. The contents of said gunny sack which was removed from under the blanket in the rear of the said Oldsmobile Sedan was examined by me and found to contain five one-gallon glass jugs of untaxpaid moonshine whiskey. Thereupon I placed defendant Archie Poulas under arrest.

E. T. KELLY

Subscribed and sworn to before me this 1st day of September, 1937.

[Seal]

S. COOK,
Deputy Clerk, U. S. District Court,
Western District of Washington.

Received a copy of the within affidavit this 7th day of Sept., 1937.

EDWARD H. CHAVELLE,
Attorney for Deft.

[Endorsed]: Filed Sept. 7, 1937. [11]

[Title of Court and Cause.]

HEARING ON PETITION TO
SUPPRESS EVIDENCE

Now on this 20th day of September, 1937, Gerald D. Hile, Assistant United States District Attorney appearing for the plaintiff, Edward H. Chavelle, Esq., appearing for the defendant, this cause comes on for hearing on petition to suppress evidence, which is argued by counsel for defendant. The petition is denied. Exception to the ruling of the Court requested and exception allowed.

Journal No. 25. Page 33. [12]

[Title of Court and Cause.]

TRIAL

Now on this 21st day of September, 1937, Gerald D. Hile, Assistant United States District Attorney appearing for the plaintiff, the defendant being in court accompanied by his counsel E. H. Chavelle, Esq., this cause is called for trial pursuant to assignment. The United States District Attorney advises the Court that the Government elects to go to trial on Count I and moves to dismiss Count II of the Indictment, which motion is granted, and said Count II is dismissed. The trial proceeds against the defendant on Count I of the Indictment. Defendant renews the motion to suppress the evidence as to Count I. The motion is denied and defendant requests, and is allowed an exception to the Court's ruling. A jury is impanelled and sworn as follows:

Herbert Hill, Thomas M. McCallister, Edna Shain, Evelyn L. Sherrill, Holly Benson, Estelle R. Graham, Marie Maxwell, Milton F. Weil, F. D. Mande, A. S. Newman, Maudie G. Waible, Ruth C. Jorgensen.

Defendant invokes the rule and witnesses are excluded from the court room except while testifying. The plaintiff makes opening statement of the case to the jury.

Plaintiff's witnesses M. S. Strubin, Edward Kelly and Hugo Ringstrom are sworn and examined. Plaintiff's exhibit numbered 1 is admitted in evidence.

Plaintiff rests its case in chief. Defendant challenges sufficiency of the evidence on grounds stated

in the stenographic record and moves for an instructed verdict of not guilty as to Count I. The motion is denied, exception requested and allowed. Defendant rests. Plaintiff rests.

Defendant again resumes the challenge of the sufficiency of the evidence and the request for an instructed verdict for the defendant, which challenge and motion are denied. Defendant requests and is allowed an exception to the Court's ruling.

[13]

After a five minute recess the trial is resumed, all jurors, defendant, and counsel being present. The cause is argued to the jury and the jury is instructed by the Court. Defendant renews motion for an instructed verdict of not guilty, which is denied, and requested exception to Court's ruling allowed. The jury retires in charge of bailiffs to deliberate of a verdict, thereafter returning into court at 5:10 P. M., with a verdict finding defendant is guilty as to Count I of the Indictment. The verdict is received and read in words and figures as follows: "We, the jury in the above-entitled cause, find the defendant Archie Poulas is guilty as charged in Count I of the indictment herein. Milton F. Weil, Foreman." The verdict is acknowledged by the jury and ordered filed. The jurors are excused from the case and until ten o'clock A. M., October 7, 1937. Sentence is set for ten o'clock A. M., next Thursday.

Journal No. 25. Pate 42. [14]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Archie Poulas is guilty as charged in Count I of the Indictment herein.

MILTON F. WEIL,
Foreman.

[Endorsed]: Filed Sep. 21, 1937. [15]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant and moves the court herein as follows:

1. To arrest the judgment herein for the reason that there was no evidence to sustain the essential material allegations of the indictment and that the only evidence in the case was that procured by wrongful search and seizure and timely motions being made to suppress the evidence and were denied and exceptions allowed and that said motions should have been granted.

EDWARD H. CHAVELLE
Attorney for Defendant.

Office and Post Office Address:

315 Lyon Building
Seattle, Washington.

Copy rec'd. Sept. 23, 1937.

G. D. HILE,
Asst. U. S. Atty.

[Endorsed]: Filed Sept. 23, 1937. [16]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Archie Poulas, and gives *notice of appeal* in the above entitled cause for the following reasons upon the following grounds:

1. That the said petition filed by the said Archie Poulas to suppress the evidence in the above entitled cause was denied and exception allowed.

2. That the motion to dismiss the indictment herein upon the ground that the conviction of the defendant was based entirely upon unlawful search and seizure and that the said defendant could not have been convicted except by the admission of the evidence so wrongfully seized.

3. That at the end of the plaintiff's case a challenge to the sufficiency of the evidence and a motion for a directed verdict was denied and exception allowed which should have been granted by reason that the said evidence was wrongfully seized.

4. That at the end of the whole case after the plaintiff and defendant had rested and motion for a directed verdict was made and denied and exception allowed and that the same should have been granted as the record disclosed no evidence except that obtained by the unlawful search and seizure.

EDWARD H. CHAVELLE

Attorney for Defendant

Office and Post Office Address:

315 Lyon Building

Seattle, Washington

Copy rec'd. Sept. 23, 1937.

G. D. HILE,

Asst. U. S. Atty.

[Endorsed]: Filed Sep. 23, 1937. [17]

[Title of Court and Cause.]

**MOTION FOR ARREST OF JUDGMENT AND
MOTION FOR NEW TRIAL DENIED**

Now on this 23rd day of September, 1937, Gerald D. Hile, Assistant United States District Attorney appearing for the plaintiff, the defendant Archie Poulas accompanied by his counsel E. H. Chavelle, Esq., is in court for pronouncement of sentence on verdict of guilty, Count I, of the indictment. Motion for a new trial and motion in arrest of judgment is filed. Motions are argued briefly by Attorney Chavelle. Motions are denied. Exception allowed to each ruling. Sentence is passed at this time. Order is to be signed at two o'clock P. M.

Defendant's attorney now requests the Court to fix amount of appeal bond, and the Court now fixes the amount thereof at \$1500.00. The defendant to remain at liberty until two o'clock today on present bond.

Journal No. 25. Page 45. [18]

United States District Court, Western District of
Washington, Northern Division.

No. 44313

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARCHIE POULAS,

alias James Melton Miller,

Defendant.

JUDGMENT AND SENTENCE

Comes now on this 23rd day of September, 1937, the said defendant Archie Poulas, alias James Melton Miller, into open Court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record heretofore imposed herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, it is

Considered, Ordered and Adjudged by the Court that the said defendant Archie Poulas, alias James Melton Miller, is guilty as charged in Count I of the indictment and as found by the jury herein, and that he be committed to the custody of the Attorney General of the United States for imprisonment in the United States Penitentiary at McNeil Island, Washington, or in such other like institution as the

Attorney General of the United States or his authorized representative may by law designate, for the period of twenty months (20), and that the said defendant further pay a fine to the United States of America in the sum of Two Hundred Dollars (\$200), [19] and that the said defendant be committed until said Two Hundred Dollar fine is paid.

And the said defendant is hereby remanded into the custody of the United States Marshal for this district for delivery to the Warden of the United States Penitentiary at McNeil Island, Washington, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of a commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in open Court this 23rd day of September, 1937.

JOHN C. BOWEN

United States District Judge.

Presented by:

G. D. HILE

Assistant United States Attorney

Violation of Section 1287, Title 26, U. S. C. A.
(Removal of distilled spirits to place other than bonded warehouse provided by law.)

[Endorsed]: Sep. 23, 1937. [20]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Archie Poulas, Seattle, Washington.

Name and Address of Appellant's Attorney:

Edward H. Chavelle, 315 Lyon Building, Seattle, Wash.

Offense:

Violation of Section 1287, Title 26, U. S. C. A.

Date of Judgment:

September 23, 1937.

Brief description of judgment or sentence:

To serve twenty (20) months at the United States Penitentiary at McNeil Island, Washington, and to pay a fine of Two Hundred Dollars (\$200.00).

Appellant is at liberty on bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

ARCHIE POULAS,

Appellant.

Dated September 23, 1937. [21]

Grounds of appeal:

1. That the Court erred in denying the appellant's timely petition to suppress the evidence herein.

2. That the Court erred in denying the motion of the appellant in a challenge to the sufficiency of

the evidence on Count I of the Indictment, Count II having been dismissed on the motion of the plaintiff.

3. That the Court erred in denying the renewed motion to suppress the evidence at the end of the plaintiff's case.

4. That the Court erred in denying the motion to dismiss Count I of the Indictment at the close of plaintiff's case.

5. That the Court erred in denying a renewal of the petition to suppress the evidence at the end of the whole case.

6. That the Court erred in denying a motion for a directed verdict after the plaintiff and defendant had rested their cases.

EDWARD H. CHAVELLE

Attorney for Appellant.

ARCHIE POULAS

Appellant.

Office and P. O. Address:

315 Lyon Building

Seattle, Washington.

Rec'd copy Sept. 23, 1937.

G. D. HILE,

Asst. U. S. Atty.

[Endorsed]: Filed Sep. 23, 1937. [22]

[Title of Court and Cause.]

APPEAL BOND OF DEFENDANT,
ARCHIE POULAS

Know All Men by These Presents: That we, Archie Poulas, as principal, and Cornelius C. Chavelle, as surety, by depositing Fifteen Hundred (\$1500.00) Dollars with the Clerk of the Court, and each of us, are held and firmly bound unto the United States of America in the full and just sum of said Fifteen Hundred (\$1500.00) Dollars, to be paid to the United States of America, to which payment, well and truly to be paid, we bind ourselves, our heirs, executors, administrators, successors and assigns, entirely and severally by these presents.

Sealed hereinbelow with our seals and dated this 27th day of September, in the year of our Lord One thousand nine hundred and thirty-seven.

Whereas, on the 21st day of September, 1937, in the District Court of the United States for the Western District of Washington, Northern Division, in a case pending in said court between United States of America, as plaintiff, and Archie Poulas, defendant, being numbered 44313 of the records of the office of the clerk of said court, a jury returned a verdict of guilty against the said Archie Poulas, adjudging him guilty as charged in the first count in the indictment of said cause, charging *them* with a violation of Section 1287, Title 26, U. S. C. A., and

Whereas, the said Archie Poulas was thereafter and on the 23rd day of September, 1937, duly sentenced by the court to the custody of the Attorney General of the United States, to be confined in some penitentiary designated by the said Attorney General for a period of twenty months and to pay to the United States of America a fine in the sum of Two Hundred and no/100 Dollars (\$200.00) and that formal judgment and sentence having been filed in the office of the clerk of the above entitled court against the said Archie Poulas, and, [23]

Whereas, the said Archie Poulas, principal herein, desires to appeal from such judgment and sentence so rendered in the above entitled cause against him to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Archie Poulas, principal, intends to diligently pursue all steps in prosecuting an appeal from the said judgment and sentence; and

Now, Therefore, the condition of the above obligation and recognizance is that if the said Archie Poulas, principal herein shall personally appear before the United States District Court for the Western District of Washington, Northern Division, in the City of Seattle, Washington in said District, from time to time and from term to term thereafter as may be ordered by the court, and then and there obey the judgment of said court and not depart from the jurisdiction of said court without leave therefrom; and that this bond and recognizance is further conditioned that the said Archie Poulas, principal, shall be and appear either in

person or by attorney in the United States Circuit Court of Appeals in the Ninth Circuit at San Francisco, California or such City as designated by the said court for the hearing on said appeal, on such day or days as may be appointed for the hearing on said appeal, and diligently prosecute the said appeal and abide by and obey all orders made by the United States Circuit Court of Appeals in said cause and shall surrender himself in execution of any judgment or sentence appealed from by the said Archie Poulas, principal herein, from the District Court of the United States for the Western District of Washington, Northern Division, as the said United States Circuit Court of Appeals for the Ninth Circuit may direct, if the judgment and sentence appealed from and against him be affirmed or the writ of error on appeal be dismissed; and if he shall appear for trial in the District Court for the Western District of Washington Northern Division, on such day or days as may be appointed for a retrial of said cause before the said District Court and abide by and obey all orders made by this court, provided the judgment [24] and sentence against him shall be affirmed, and/or reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and render himself in execution of the Judgment herein, should said judgment and sentence be affirmed, then the above obligation to be void; otherwise to be and remain in full force, virtue and effect.

ARCHIE POULOS,

Principal.

CORNELIUS C. CHAVELLE,

Surety.

Approved this 1st day of October, 1937.

JOHN C. BOWEN,
District Judge.

Approved as to form

J. CHARLES DENNIS,
U. S. Atty.

G. D. HILE,
Asst. U. S. Atty.,
Attys. for Pltf.

Advised that surety is not an attorney at law.

Oct. 1, 1937.

JOHN C. BOWEN,
Judge.

[Endorsed]: Filed Oct. 1, 1937. [25]

[Title of Court and Cause.]

ORDER GRANTING EXTENSION OF TIME
FOR SETTLING BILL OF EXCEPTIONS

Upon motion of the plaintiff in the above entitled cause, good cause being shown therefor, it is by the Court hereby

Ordered that the time for settling, signing, allowing and filing of the bill of exceptions herein is hereby extended to and including the 11th day of November, 1937, and it is

Further Ordered that the present term of this Court be and the same is hereby extended for said purpose until the expiration of said extended time, and it is

Further Ordered that the United States of America, plaintiff herein, shall have until the 4th day of November, 1937, for the purpose of lodging its exceptions and amendments to the proposed bill of exceptions lodged herein by said defendant Archie Poulas.

Done in open Court this 22 day of October, 1937.

JOHN C. BOWEN,

United States District Judge.

Presented by:

G. D. HILE.

Approved as to form,

EDWARD H. CHAVELLE,

Atty. for Deft.

[Endorsed]: Filed Oct. 22, 1937. [26]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare copies of the following documents and papers in the above cause and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz:

1. Indictment.
2. Arraignment.
3. Plea of not guilty.
4. Petition to suppress evidence.

5. Affidavit in support of petition to suppress evidence.
6. Affidavits of plaintiff in opposition to defendant's motion to suppress evidence.
7. Record of hearing thereon and journal entry of same including ruling on petition to suppress evidence.
8. Record of the trial and journal entry of order empanelling jury.
9. Verdict of guilty.
10. Motion in arrest of judgment.
11. Motion for new trial.
12. Order denying new trial and in arrest of judgment.
13. Sentence and judgment of Court.
14. Notice of appeal.
15. Assignment of errors.
16. Appeal bond.
17. Order extending time for filing and allowing Bill of Exceptions.
18. Bill of exceptions.
19. Certificate and order allowing bill of exceptions and settling same.
20. Praecipe for appellate record.
21. Clerk's certificate.

EDWARD H. CHAVELLE,
Attorney for Defendant.

Copy rec'd. Nov. 17, 1937.

J. CHARLES DENNIS,
U. S. Atty.

G. D. HILE,
Asst. U. S. Atty.

[Endorsed]: Filed Nov. 17, 1937. [27]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD

United States of America,
Western District of Washington,
Northern Division—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 27, inclusive, is a full, true, and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as the same remain of record and on file in my office, as is required by praecipe of counsel filed and shown herein, with the exception of the Bill of Exceptions and Assignments of Error, the originals of which are transmitted with this transcript, and that the foregoing constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 23rd day of November, 1937.

[Seal]

EDGAR M. LAKIN,
Clerk, United States District Court,
Western District of Washington.
By TRUMAN EGGER,
Deputy Clerk. [28]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that on the 21st day of September, 1937 the above entitled cause came on regularly for trial in the above entitled court, before the Honorable John C. Bowen, Judge thereof, sitting with a jury. The trial was begun on said date and concluded on the same date by submission to the jury. Said jury on the same date, by its verdict, found the defendant herein guilty of Count I of the indictment.

Plaintiff appeared by J. Charles Dennis, United States Attorney for the Western District of Washington, and G. D. Hile, Assistant United States Attorney for said district.

Defendant appeared in person and by his attorney of record herein, Edward H. Chavelle.

Prior to the date of said trial, on August 26th, 1937 the defendant duly and regularly served and filed herein a petition to suppress in the following form:

“To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division.

Archie Poulas of Seattle, King County, Washington, respectfully shows: [29]

I.

That on the 17th day of February, 1937 on Western Avenue in the City of Seattle, County of King, State of Washington, your petitioner was sitting in

a sedan Oldsmobile automobile belonging to one, Anderson, and that Internal Revenue Agents, E. Kelly and N. F. Strubin, approached said car without any search warrant or any warrant whatsoever and proceeded to search the same and found in the automobile of said Anderson, something that they claimed was contraband and that without a warrant searched and seized from the said car the said article and seized said automobile and arrested your petitioner.

II.

That your petitioner is not engaged in any business of any kind pertaining to or connected with the transportation of or possession of intoxicating liquors and that affiant was acting in a lawful and orderly manner and was merely sitting in said car waiting for the said Anderson to return but the said officers did not pretend to have a legal right to search said car or seize from the said automobile any of the articles therein contained but without authority and in violation of the constitutional rights of the petitioner they seized and took from said automobile said articles which they intend to use against the said petitioner in the trial of this case.

Petitioner, therefore prays that a rule be made requiring the United States attorney for [30] the Western District of Washington, Northern Division, to show cause before this Court why said search warrant should not be quashed and for nothing holden and why the said District Attorney and Internal Revenue Department should not be restrained from making any use of the said articles

seized by them and for such other and further relief as to the Court shall seem just.

ARCHIE POULAS,
Petitioner.

EDWARD H. CHAVELLE,
Attorney for Petitioner.
315 Lyon Bldg.,
Seattle, Washington.

United States of America,
Western District of Washington,
Northern Division—ss.

Archie Poulas, being first duly sworn, on oath, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read the same, knows the contents thereof and believes the same to be true.

ARCHIE POULAS.

Subscribed and sworn to before me this 26th day of August, 1937.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
residing at Seattle. [31]

Attached to said petition was an affidavit in the following form:

United States of America,
Western District of Washington,
Northern Division—ss.

Archie Poulas, being first duly sworn, on oath, says:

That he has read the petition to suppress herein, knows the contents thereof and believes the same

to be true; that said affiant especially refers to and by such reference makes the same a part of this affidavit;

That on the 17th day of February, 1937, affiant was sitting in a sedan Oldsmobile automobile belonging to one, Anderson, on Western Avenue, in the City of Seattle, County of King, State of Washington when two internal revenue agents, namely, E. Kelly and N. F. Strubin, approached the said car without any search warrant or any warrant whatsoever and proceeded to search the said car and found in the automobile of said Anderson, something which they claimed was contraband and without a warrant searched and seized from the said car the said article and seized said automobile and arrested this affiant; that at the time of said search and seizure affiant was acting in an orderly and lawful manner sitting in said car waiting for the said Anderson to return.

ARCHIE POULAS

Subscribed and sworn to before me this 26th day of August, 1937.

EDWARD H. CHAVELLE

Notary Public in and for the State of Washington,
residing at Seattle.

Received a copy of the within Petition this 27th day of Aug., 1937.

J. CHARLES DENNIS

Attorney for Pltff. [32]

Thereafter, on September 7th, 1937, plaintiff duly and regularly served and filed herein two affidavits

in opposition to said petition to suppress, said affidavits being in the following form:

“United States of America,
Western District of Washington,
Northern Division—ss.

N. F. Strubin, being first duly sworn, on oath deposes and says: That he is an Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States, and makes this affidavit on behalf of the United States of America.

That on February 17, 1937, I had information from a source heretofore found to be very reliable in regard to illicit liquor transactions, that the defendant Archie Poulas was to make a delivery of untaxpaid whiskey on the afternoon of said date to a frame dwelling house located on the westerly side of Western Avenue, Seattle, Washington, in the 3100 block, and that said defendant Archie Poulas would be driving a 1934 brown Oldsmobile Sedan, Washington License A-25-809.

That Investigator Kelly and I proceeded at about 3:30 P. M. on said date to Queen Anne Avenue in Seattle, Washington, near the intersection of Western Avenue and Denny Way, and observed this intersection. At about 4:15 P. M. on said date I saw the Oldsmobile Sedan above described, being driven by Archie Poulas, pass in front of me and turn into Western Avenue and stop directly in front of said frame house where we had been informed the delivery of untaxpaid whiskey was to be made. [33]

Archie Poulas looked around several times and in the meantime Investigator Kelly and I proceeded in the government car and approached said Oldsmobile Sedan and stopped alongside said automobile.

Thereupon Investigator Kelly explained to Poulas that he was a federal officer and asked the said Archie Poulas what he had in the car. Poulas replied that he had moonshine in the car. After hearing the reply of the said Archie Poulas I lifted up a blanket in the rear of said Oldsmobile Sedan and found five one-gallon glass jugs in a gunny sack, each jug containing one gallon of untaxpaid moonshine whiskey. Thereupon Investigator Kelly examined the contents of said gunny sack which I had removed from said Oldsmobile Sedan and placed the defendant Archie Poulas under arrest.

That prior to the time the foregoing facts occurred I knew that Poulas had a reputation for being a persistent violator of the Internal Revenue Laws of the United States relating to liquor.

N. F. STRUBIN

Subscribed and sworn to before me this 1st day of September, 1937.

[Seal]

S. COOK

Deputy Clerk, U. S. District Court, Western
District of Washington.

Received a copy of the within affidavit this 7th day of Sept., 1937.

EDWARD H. CHAVELLE

Attorney for def. [34]

United States of America,
Western District of Washington,
Northern Division—ss.

E. T. Kelly, being first duly sworn, on oath deposes and says: That he is an Investigator of the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States and makes this affidavit on behalf of the United States of America.

That on February 17, 1937, I had information from a source heretofore found to be very reliable in regard to illicit liquor transactions, that the defendant Archie Poulas was to make a delivery of untaxpaid whiskey on the afternoon of said date to a frame dwelling house located on the westerly side of Western Avenue, Seattle, Washington, in the 3100 block, and that said defendant Archie Poulas would be driving a 1934 brown Oldsmobile Sedan, Washington License A-25-809.

That Investigator Strubin and I proceeded at about 3:30 P. M. on said date to Queen Anne Avenue in Seattle, Washington, near the intersection of Western Avenue and Denny Way, and observed this intersection. At about 4:15 P. M. on said date I saw the Oldsmobile Sedan above described, being driven by Archie Poulas, pass in front of me and turn into Western Avenue and stop directly in front of said frame house where we had been informed the delivery of untaxpaid whiskey was to be made. Archie Poulas looked around several times and in the meantime Investigator Strubin and I proceeded in the government car and approached said Oldsmo-

bile Sedan and stopped alongside said automobile.
[35]

Thereupon I explained to Archie Poulas that I was a federal officer and asked the said Archie Poulas what he had in the car. Poulas replied that he had moonshine. After hearing the reply of the said Archie Poulas Investigator Strubin lifted up a blanket in the rear of said Oldsmobile Sedan and found five one-gallon glass jugs in a gunny sack. The contents of said gunny sack which was removed from under the blanket in the rear of the said Oldsmobile Sedan was examined by me and found to contain five one-gallon glass jugs of untaxpaid moonshine whiskey. Thereupon I placed defendant Archie Poulas under arrest.

E. T. KELLY

Subscribed and sworn to before me this 1st day of September, 1937.

[Seal]

S. COOK

Deputy Clerk, U. S. District Court, Western
District of Washington.

Received a copy of the within affidavit this 7th day of Sept., 1937.

EDWARD H. CHAVELLE

Attorney for def."

Thereafter, on September 20th, 1937, said petition to suppress came on regularly for hearing before the said Honorable John C. Bowen. After considering the petition to suppress, the affidavit in support thereof and the plaintiff's affidavits in opposition thereto, and the arguments of counsel, the Court on

the same date entered its order herein denying the suppression of the evidence as prayed in said petition, to which defendant excepted and his exception was by the Court allowed. [36]

On September 21st, 1937, said cause came on regularly for trial before said Judge and before a jury duly impaneled and sworn. Prior to the taking of any evidence, the defendant renewed his petition to suppress theretofore filed herein and above set forth in full, and all the allegations thereof. The Court again denied said petition to suppress, to which ruling the defendant excepted and his exceptions were by the Court allowed.

The following proceedings then occurred:

Testimony of N. F. Strubin for the Plaintiff.

N. F. STRUBIN,

a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hile:

I am an investigator in the Alcohol Tax Unit in the Bureau of Internal Revenue, and have been acting in that capacity for the last six and one-half or seven years. On February 17th, 1937 I had occasion to investigate the activities of the defendant Archie Poulas.

“Q. State what occurred.

A. Kelly and I were working together, and we had information that there would be a delivery of moonshine whiskey made in the 31 hundred block

(Testimony of N. F. Strubin.)

on Western Avenue in this city sometime after 3 o'clock.

Mr. Chavelle: I object to that as pure hearsay.

Mr. Hile: It is a statement of fact.

The Court: The objection is overruled.

Mr. Chavelle: Note an exception.

The Court: The exception is allowed.

Q. (Mr. Hile) Will you please continue?" [37]

Kelly and I proceeded to the vicinity of the above address and parked where we had a view of the 3100 block on Western Avenue. At approximately 4:15 in the afternoon the defendant drove up in an Oldsmobile automobile in front of the address we had under observation, and stopped. After he stopped we drove alongside of his car and Kelly approached him. I heard Kelly ask the defendant what he had in the car, and heard the defendant say he had moonshine whiskey. We then searched the car and in the rear found five one-gallon jugs of moonshine whiskey with no tax stamps on any of the jugs. The defendant was placed under arrest, and we seized the moonshine whiskey and took it to the local office of the Alcohol Tax Unit. We took a sample from the five gallons and placed it in a pint bottle and turned the sample over to our chemist, Mr. Ringstrom. Plaintiff's Exhibit marked 1 for identification is the sample taken from the five gallons of moonshine whiskey seized from the defendant on February 17th, 1937.

(Testimony of N. F. Strubin.)

“Q. At the time you were observing the premises in question were you looking for any specific car or specific person?

A. We were.

Mr. Chavelle: I object to that. I don't think that is material. The fact he placed these premises under observation has nothing to do with this particular case, because there is no issue as to where the defendant was at the time or that he was in any way identified with these premises.

The Court: The objection is overruled.

Mr. Chavelle: Note an exception.

The Court: The exception is allowed.” [38]

I was also looking for a brown 1934 Oldsmobile sedan. At the time of his arrest the defendant was in such an automobile. He was alone.

Cross Examination

By Mr. Chavelle:

We received the information relative to the delivery to be made and the Oldsmobile sedan about 3 o'clock P. M., and we arrested the defendant about 4:15 P. M. I was not in the office when I received the information. I cannot state positively where I was when I received it.

(It was then stipulated by counsel for plaintiff for the purpose of the record that the investigators had no search warrant.)

Kelly and I were together. We drove alongside the defendant's car. Kelly asked him what he had in the car, and the defendant said he had moon-

(Testimony of N. F. Strubin.)

shine. He did not mention the quantity, nor first deny that he had moonshine and later admit that he had it. We proceeded to search the car and I saw no moonshine in the car until we searched it. The car was standing still at the time, the defendant being double parked. The moonshine could not be seen from the outside as it was under an automobile blanket and in a gunny sack. I have had many cases where a violator transporting moonshine whiskey in cars has admitted that he had moonshine in the car upon being questioned. I cannot call any such case by name right now.

Redirect Examination

By Mr. Hile:

The liquor was between the front and back seat of the car. One could see that there was something [39] there, but the blanket completely covered the object. There were five one-gallon jugs in one gunny sack, which was tied at one end.

Recross Examination

By Mr. Chavelle:

There was first a thick woolen blanket covering the liquor, and under that the gunny sack containing the five one-gallon jugs. I don't know whether the jugs were in paper sacks. I didn't know what was under the blanket until I raised it. I was driving the government car, and drove the same alongside the defendant's car as soon as he stopped. The defendant's car was a four-door sedan, and the

(Testimony of N. F. Strubin.)

defendant did not get out of his car. Kelly was on the side nearest the defendant.

Redirect Examination

By Mr. Hile:

This occurred in the 3100 block on Western Avenue in Seattle, Washington. The jugs bore no stamps of any kind.

Testimony of Edward Kelly for the Plaintiff

EDWARD KELLY

a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

by Mr. Hile:

I have been an investigator in the Alcohol Tax Unit for the last five years. On February 17th, 1937 I had occasion to investigate the activities of the defendant. In company with Investigator Strubin I went to the [40] vicinity of the 3100 block on Western Avenue, where we remained parked in a government car, placing that address under observation. We had reliable information that a delivery of five gallons of untaxpaid moonshine whiskey would be made at that place. We remained there for some time until we saw a car with which I was familiar and knew to be used by the defendant. The car was an Oldsmobile sedan, brown in color, a 1934 model, and bore License No. A-25-809. The defend-

(Testimony of Edward Kelly.)

ant drove directly in front of us and drove toward the address in the 3100 block he was attempting to reach. The defendant stopped his car and Strubin and I drove alongside of his car, stopping our automobile parallel to the defendant's car. I stepped out of our car. I approached the defendant, displayed my badge to him and informed him that I was a federal officer. I asked him what he had in the car, and he said "some moonshine whiskey". There was a blanket covering an object in the back of the car. I removed the object and found it was a gunny sack inside of which I found five one-gallon jugs of moonshine whiskey. No revenue stamps were affixed to any of these containers.

We questioned the defendant after placing him under arrest, and he admitted that his name was Archie Poulas and that Miller was an alias. This all occurred in Seattle, Washington. The liquor seized from the defendant was transported by Mr. Strubin and myself to the office of the Alcohol Tax Unit. A sample of the contents of one of the jugs was taken and given to Mr. Ringstrom. Plaintiff's Exhibit marked 1 for identification is the sample removed from one of the gallon jugs seized from the defendant and given to the chemist. The liquor was at all times in my possession up to the time the sample was given to Mr. Ringstrom. The liquor was in the same condition, at the [41] time it was handed to Mr. Ringstrom, as it was at the time we found it in the defendant's possession.

(Testimony of Edward Kelly.)

At the time we had the mentioned address under observation, I was looking for a particular individual, the defendant. I was also looking for a particular car, a 1934 Oldsmobile sedan, License No. A-25-809. I made a notation as to the license number of that car on the day the defendant was arrested.

Cross Examination

By Mr. Chavelle:

I made contemporaneous memorandum of the license number of the defendant's car at the time, and refreshed my recollection from that memorandum. I had been looking for defendant's car from February 9th to February 17th. I also knew the individual I was looking for, and expected to find contraband whiskey in the car. I not only had information from the 8th to the 17th as to the number of the car, but I had also seen the car. I did not get a search warrant or make application for one, nor did I serve one. No one else that I know made application for a search warrant in connection with this arrest and seizure.

There was nothing in the defendant's car as I came alongside it which would indicate that there was any moonshine or whiskey in the car until I went through it. There was a blanket over the sack.

When I first approached the defendant, I displayed my badge to him and informed him I was a federal officer. I was standing beside his car, which had been stopped. He wasn't doing anything which would indicate that he was violating the law. He

(Testimony of Edward Kelly.)

was not speeding; he had been going very cautiously and peering down the street. [42] Strubin was still in the government car. I asked the defendant what he had in the car, and he said "I have some moonshine". I have had others tell me in response to a question that they had monshine in the car. I don't recall any particular case offhand. I could not see what was in the car until after he had admitted he had the moonshine and I had searched it.

Redirect Examination

By Mr. Hile:

I received the information that this car was to arrive in the 3100 block on Western Avenue on February 17th the day of the arrest.

Recross Examination

By Mr. Chavelle:

I knew that the defendant was using this particular car to transport untaxpaid whiskey, but this particular instance I did not know until the 17th.

Testimony of Hugo Ringstrom for the Plaintiff

HUGO RINGSTROM,

a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hile:

I am a chemist for the Alcohol Tax Unit.

(At this point, the defendant admitted Mr. Ringstrom's qualifications as a chemist. [43])

(Testimony of Hugo Ringstrom.)

Plaintiff's Exhibit marked 1 for identification is moonshine whiskey. I obtained possession of the exhibit from Mr. Kelly. The contents are in the same condition, except as to quantity, as at the time I received the exhibit. The exhibit has been in my possession since the time I received it. I made an analysis of the contents and found it to be moonshine whiskey of 85.6 proof, which is 42.8 percent alcohol by volume. The contents of the exhibit are suitable for human consumption.

Cross Examination

By the Court:

The sample I tested is known as moonshine whiskey. It is whiskey.

Thereupon the following occurred:

Mr. Hile: I now offer plaintiff's exhibit "1" for identification in evidence.

Mr. Chavelle: We object to its introduction in evidence for the reason and upon the ground we have heretofore filed a petition to suppress, and the testimony has been supplemented from the witness stand, and it has developed there was a period of nine days that the government agents were looking for this particular car and this particular individual, and in that interim was an abundance of time to make application for and to secure a proper search warrant showing probable cause, and none

was secured, and the search was illegal and unlawful, and the arrest was illegal and unlawful, [44] and therefore the exhibit marked plaintiff's exhibit "1" for identification should not be admitted, your Honor.

The Court: The objection is overruled, and plaintiff's exhibit "1" is now admitted.

Mr. Chavelle: Your Honor will allow an exception?

The Court: The exception is allowed.

(Bottle of whiskey admitted in evidence as plaintiff's exhibit "1".)

Mr. Hile: That is the plaintiff's case.

Mr. Chavelle: At this time, your Honor, I move against Count 1—the only count left in the information—and challenge the sufficiency of the evidence, for the reason and upon the ground, your Honor, there has been no proof of the allegations contained in Count 1. A motion to suppress the evidence has been presented to the court and filed in this case, and answering affidavits have been filed, and at this time it develops there is additional evidence that there was sufficient and abundant time, namely, 8 or 9 days in which to secure a search warrant, or show probable cause for securing it, and none was secured, and the search was unlawful and based upon the alleged admission made by the defendant, and made after his arrest, and the petition should be granted, and the jury instructed to return a verdict of not guilty upon the only remaining count, count 1 of this indictment.

The Court: The challenge is overruled and the motion denied.

Mr. Chavelle: Allow us an exception. [45]

The Court: The exception is allowed. The defendant may now make his opening statement.

Mr. Chavelle: We have no proof to submit. We contend the Government has failed to prove its case, and it is unnecessary for us to present any proof.

The Court: Does the defendant rest?

Mr. Chavelle: Yes, your Honor.

The Court: The plaintiff rests?

Mr. Hile: Yes.

Mr. Chavelle: At the close of the whole case, I wish to renew our motion, and in addition to the motion previously made, I make a motion for a directed verdict, directing the jury to return a verdict of not guilty on Count 1, as against the defendant Archie Poulas, for the reason and upon the ground that the evidence that is in the case should have been suppressed and further upon the evidence that has been produced by the plaintiff, as it is now apparent that sufficient time was available, namely, 8 or 9 days, for the plaintiff to have secured, upon the showing of probable cause, a search warrant in this case.

The Court: The motion is denied.

Mr. Chavelle: Allow us an exception.

The Court: Exception allowed.

Mr. Chavelle: Further I believe it is necessary for me to ask the Court to direct the jury to return a verdict of not guilty on Count 1, for the reason the Government has not sustained by proof the allega-

tions of said Count 1, necessary to establish the guilt of the defendant under Count 1. [46]

The Court: The motion is denied.

Mr. Chavelle: Allow us an exception.

The Court: The exception is allowed.

(Respective counsel then argued to the jury.

The Court then instructed the jury.)

The Court: Any exceptions?

Mr. Chavelle: No, your Honor. The defendant has no exceptions to the instructions, but at this time, in order to preserve the record, I believe it is necessary for the defendant to again request the Court to instruct the jury to return a verdict of not guilty against the defendant Archie Poulas, on Count 1 of the indictment, for the reasons that have been previously stated, namely, that the petition to suppress the evidence should have been granted.

The Court: That motion is denied.

Mr. Chavelle: Note an exception.

The Court: The exception is allowed.

(The jury then retired to consider its verdict.)

Thereafter, on September 21st, 1937, the jury returned its verdict herein, finding the defendant guilty of Count I of the Indictment herein, said verdict being read in open Court in the presence of the Court, the defendant, his attorney of record herein, the jury, and counsel for the government. Said verdict was filed herein on September 21st, 1937.

On September 23rd, 1937 the defendant duly served and filed his motion in arrest of judgment herein, said motion being in the following form: [47]

“Comes now the defendant and moves the court herein as follows:

1. To arrest the judgment herein for the reason that there was no evidence to sustain the essential material allegations of the indictment and that the only evidence in the case was that procured by wrongful search and seizure and timely motions being made to suppress the evidence and were denied and exceptions allowed and that said motions should have been granted.

EDWARD H. CHAVELLE

Attorney for Defendant

Office and Post Office Address:

315 Lyon Building,
Seattle, Washington.

Copy recd. Sept. 23, 1937.

G. D. HILE,

Asst. U. S. Atty.”

Said motion was on the same date denied by the Court, to which ruling the defendant excepted and his exception was by the Court allowed.

Thereupon, on the same date, the defendant was sentenced by the Court to imprisonment at McNeil Island Penitentiary, Washington, for a period of twenty months and to pay a fine to the United States in the sum of Two Hundred Dollars, and to stand committed until said fine is paid. Said judgment and sentence was by the Court reduced to

writing and signed in the presence of the defendant and his attorney of record herein, and counsel for the government, and was filed herein on September 23rd, 1937. [48]

Thereupon on September 23rd, 1937 the defendant duly and regularly served and filed his notice of appeal and assignments of error.

Thereafter, on October 21st, 1937 the defendant duly and regularly served and lodged with the Clerk of this Court his proposed bill of exceptions.

On October 22nd, 1937 the Court entered herein its written order extending the time for settling the bill of exceptions, said order being in the following form:

“Upon motion of the plaintiff in the above entitled cause, good cause being shown therefor, it is by the Court hereby

Ordered that the time for settling, signing, allowing and filing of the bill of exceptions herein is hereby extended to and including the 11th day of November, 1937, and it is

Further ordered that the present term of this Court be and the same is hereby extended for said purpose until the expiration of said extended time, and it is

Further ordered that the United States of America, plaintiff herein, shall have until the 4th day of November, 1937, for the purpose of lodging its exceptions and amendments to the proposed bill of

exceptions lodged herein by said defendant Archie Poulas.

Done in open Court this 22 day of October, 1937.

JOHN C. BOWEN

United States District Judge

Presented by:

G. D. Hile

Approved as to form:

EDWARD H. CHAVELLE

Atty. for deft." [49]

Said order was filed herein on October 22nd, 1937.

Plaintiff's amendments to defendant's proposed bill of exceptions were lodged herein November 3, 1937. [J. C. B.] [50]

CERTIFICATE

The foregoing Bill of Exceptions contains all of the material evidence given or offered on the trial, with a jury, of the above cause, and correctly shows the proceedings had on said trial and all material proceedings therein occurring after said trial; and said Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein. Said Bill of Exceptions is further settled and approved within the judgment term as heretofore duly and regularly extended by order of Court herein.

Let the Bill be filed and the filing shown of record as of this 9th day of November, 1937.

Done in open Court this 9th day of November, 1937.

JOHN C. BOWEN

Judge who presided at said trial

The foregoing Bill of Exceptions approved this 9th day of November, 1937.

J. CHARLES DENNIS

U. S. Atty.

G. D. HILE,

Asst. U. S. Atty.

Of counsel for Plaintiff

EDWARD H. CHAVELLE

By H. W. HODGWICK

Of counsel for Defendant

Received a copy of the within Pltff's. Proposed Bill of Exceptions this 3 day of Nov., 1937.

EDWARD H. CHAVELLE

Attorney for Defendant

[Endorsed]: Filed Nov. 9, 1937. [51]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the above named defendant, Archie Poulas, by Edward H. Chavelle, his counsel, and says that in the records and proceedings in the above entitled cause there is manifest error in this, to-wit:

1. That the court erred in overruling the motion of the defendant to suppress the evidence,

which motion was made before the case was called for trial upon the ground and for the reason that the evidence was secured by unlawful search and seizure. That timely exceptions were taken to the actions of the court in denying the motion to suppress the evidence and that the petition to suppress the evidence was timely made.

2. That the court erred in allowing testimony to go to the jury during the trial of the said cause, over the objection of the defendant's counsel, as to statements made by the defendant, and as to the surrounding circumstances as part of the *res gestae*, for the reason that said evidence was secured through said unlawful search.

3. That the court erred in allowing testimony to go to the jury in the trial of the case, over the objection of the defendant's counsel, which was excepted to and said exceptions were allowed. [52]

4. That the court erred in denying the challenge to the sufficiency of the evidence in Count I of the indictment, Count II having been dismissed upon the motion of the plaintiff, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime.

5. That the court erred in overruling the motion of the defendant for a directed verdict of acquittal, made at the close of the entire cause, and before it was submitted to the jury, which motion was based upon the ground that there was no evidence offered except that secured by illegal search and seizure.

6. That the court erred in denying the motion to dismiss Count I of the indictment at the close of the plaintiff's case.

7. That the court erred in denying a renewal of the petition to suppress the evidence at the end of the whole case.

8. That the court erred in denying defendant's motion for a directed verdict after plaintiff and defendant had rested their cases.

9. That the court erred in denying the motion of the defendant for a new trial, which motion was made in due time after the jury had returned a verdict upon Count I of said information.

Wherefore, the said Archie Poulas, defendant herein, prays that the judgment be reversed and that said court be directed to grant a new trial in said cause.

EDWARD H. CHAVELLE

Attorney for Defendant

Office & Post Office Address:

315 Lyon Building,
Seattle, Washington .

Received a copy of the within Assignments of Error this 21st day of Oct., 1937.

J. CHARLES DENNIS

Attorney for U. S.

[Endorsed]: Filed Oct. 21, 1937. [53]

[Endorsed]: No. 8686. United States Circuit Court of Appeals for the Ninth Circuit. Archie Poulas, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed November 26, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 8686

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF ARCHIE POULAS, APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

EDWARD H. CHAVELLE,
Attorney for Appellant.

315 Lyon Building
Seattle, Washington

FILED

JAN 25 1925

ANDREW P. O'NEILL

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No. 8686

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF ARCHIE POULAS, APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

STATEMENT OF THE CASE

This appeal arises out of the indictment of the defendant, Archie Poulas, for the violation of Sections 1287 and 1441, Title 26, U. S. C. A.

The defendant entered a plea of "not guilty" to both counts of the indictment and thereafter petition to suppress the evidence was duly and regularly filed and argued and the petition denied. An exception was made to the Court's ruling denying the petition to suppress and exception allowed. Thereafter the case was called for trial and the government elected to go to trial on Count I and moved to dismiss Count II of the indictment. The motion was granted and Count II was dismissed. Defendant renewed the motion to suppress the evidence as to Court I, the motion was denied and the defendant's request was allowed as to an exception to the Court's ruling.

The Court proceeded with the trial of the case and witnesses were sworn, examined and plaintiff's exhibit numbered one was admitted in evidence to which defendant objected and exception was requested and allowed, and thereupon the plaintiff rested its case in chief.

The defendant challenged the sufficiency of the evidence on the ground that the Court had erred in failing to grant the petition to suppress and the defendant moved for an instructed verdict of not guilty

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as to Count I, and the motion was denied, exception requested and allowed. Defendant rested and plaintiff rested without offering any testimony.

Defendant again resumed the challenge to the sufficiency of the evidence and for the reason that the court erred in denying the petition to suppress the evidence and the defendant's request was allowed an exception to the Court's ruling.

Thereafter the case was argued to the Jury and the defendant renewed the motion which was denied and request for the exception was allowed by the Court.

The Jury retired and found the defendant guilty on Count I of the indictment.

Thereafter a motion for an arrest of judgment and for a new trial was regularly made and denied and exception requested and allowed and the defendant was sentenced to twenty months at the United States Penitentiary at McNeil Island, Washington, and to pay a fine in the sum of \$200.00 and to be committed until said fine is paid.

STATEMENT OF FACTS

It was stipulated by counsel for the plaintiff and the government for the purpose of the record, that the investigators for the Alcohol Tax Unit, Bureau of Internal Revenue, Treasury Department of the United States, N. F. Strubin and E. T. Kelly, had no search warrant. That there was no search warrant.

Investigators, Strubin and Kelly, drove alongside the defendant's car which was standing still and asked him what he had in the car and the investigators allege that the defendant answered that he had moonshine in the car. (T. p. 34)

They saw no moonshine in the car until they searched for it. The contraband could not be seen from the outside as it was under an automobile blanket and in a gunny sack. (T. p. 34) The liquor was between the front seat and the back seat of the car. The blanket completely covered the object. (T. p. 39, 40) The investigators did not know what was under the blanket until they raised it. They did not know what was in the gunny sack until they opened it. The

defendant at the time of the search and seizure was acting in an apparently lawful manner and there was nothing in the defendant's car as the officers came alongside of it that would indicate the fact that it contained contraband until they searched it. (T. p. 43)

As its first witness the government called investigator, Strubin, who stated that the car was standing still at the time of the search and seizure and that no contraband could be seen from the outside as it was under an automobile blanket and in a gunny sack. (T. p. 34)

E. T. Kelly, investigator, was then called as a witness and he testified that he drove alongside of the defendant's car when it stopped; that there was a blanket covering some object in the back of the car; that he removed the blanket and found a gunny sack inside of which there were five one-gallon jugs of moonshine. (T. p. 34)

On cross-examination, Kelly testified that he had been looking for the defendant's car from February 9th to February 17th; that he was looking for a particular individual, namely, Archie Poulas and was

also looking for a particular car, a 1934 Oldsmobile sedan, license No. A-25-809. (T. p. 43)

That he had not only had information from the 9th of February to the 17th of February, 1937, but that he had not secured a search warrant or made application for one nor did he know of anyone else who might have made application for a search warrant in connection with the search and seizure; that there was nothing in the defendant's car as he came alongside of it, which would indicate that there was any contraband until he searched the car and found the blanket over the gunny sack in which there was moonshine. (T. p. 43)

That the defendant was not doing anything which would indicate that he was violating the law; that he could not see what was in the car until he had searched it. (T. p. 43)

THE QUESTION ON APPEAL

The question on this appeal is whether the Court erred in refusing to suppress the evidence.

ASSIGNMENTS OF ERROR

I.

That the court erred in overruling the motion of the defendant to suppress the evidence, which motion was made before the case was called for trial upon the ground and for the reason that the evidence was secured by unlawful search and seizure. That timely exceptions were taken to the actions of the court in denying the motion to suppress the evidence and that the petition to suppress the evidence was timely made.

II.

That the Court erred in allowing testimony to go to the jury in the trial of the case, over the objection of the defendant's counsel, as to statements made by the defendant, and as to the surrounding circum-

stances as part of the *res gestae*, for the reason that said evidence was secured through said unlawful search.

III.

That the Court erred in allowing testimony to go to the Jury in the trial of the case, over the objection of the defendant's counsel, which was excepted to and said exceptions were allowed.

IV.

That the Court erred in denying the challenge to the sufficiency of the evidence in Count I of the indictment, Count II having been dismissed upon the motion of the plaintiff, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime.

V.

That the Court erred in overruling the motion of the defendant for a directed verdict of acquittal, made at the close of the entire cause, and before it was submitted to the Jury, which motion was based upon the ground that there was no evidence offered except that secured by illegal search and seizure.

VI.

That the Court erred in denying the motion to dismiss Count I of the indictment at the close of the plaintiff's case.

VII.

That the Court erred in denying a renewal of the petition to suppress the evidence at the end of the whole case.

VIII.

That the Court erred in denying defendant's motion for a directed verdict after the plaintiff and defendant had rested their cases.

IX.

That the Court erred in denying the motion of the defendant for a new trial, which motion was made in due time after the jury had returned a verdict upon Count I of said information.

BRIEF OF THE ARGUMENT

To justify search, evidence of senses must indicate commission of crime. The majority of cases hold that no general right exists to stop automobiles and search them without warrant. Under the Federal rules and the State statute, to justify search and seizure or arrest without warrant, the officers must have direct personal knowledge through their hearing, sight or other senses of the commission of the crime by the accused.

Elrod v. Moss, 278 Fed. 123

If the officers had no real belief that a violation of law had been discovered and if in the opinion of the court this belief was not based upon probable cause, the arrest is not legal, the search is not effective and the evidence obtained thereby may not be availed of. Officers should be very loathe to interfere with the rights of citizens and should not arrest on mere suspicion and whenever an arrest and subsequent search of a person or vehicle is made without warrant, the government must be prepared to show, if it expects the evidence to be admissible, that the arrest and

search was not a mere exploratory enterprise for the purpose of discovery, but was based upon a sincere belief, with reasonable grounds therefor, that an offense had been committed by the person or vehicle arrested.

U. S. v. Rembert, 284 Fed. 996

Moreover, the legality of the arrest and the search must be determined by the facts as they are known to the officer at the moment the arrest was made or the search instituted and can never be justified by what has been found. A search that is unlawful when it begins, is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying on the chance of discovery that the Fourth Amendment was passed to protect the people.

U. S. v. Slusser, 270 Fed. 818

U. S. v. Kaplan, 286 Fed. 963

In the Kaplan case, Judge Barrett, speaking for the Court, said:

“The fact of finding liquor by reason of the search of either suitcase or automobile cannot be justification for a search that was made without

a lawful warrant or without probable cause for believing that a crime was being committed in the presence of the officer.

In *U. S. v. Myers*, 287 Fed. 260, Justice Evans, speaking for the Court, said:

“It seems entirely clear that evidence obtained in the manner shown here cannot be used against the defendant without an energetic disregard of the 5th Amendment to the Constitution.”

In *Hernandez v. U. S.* (C. C. A. Calif. 1927) 17 F. (2d) 373 this Honorable Court held that the arrest without warrant was without probable cause and the contraband found on search inadmissible.

Mere suspicion does not justify arrest and search without warrant.

U. S. v. Wiggins, (D. C. Minn. 1927) 22 F. (2d) 1001

Search and seizure of a truck without warrant or previous information held unlawful and not aided by statement of driver after officers were in possession of truck.

U. S. v. Hanley (D. C. N. Y. 1931) 50 F. (2d) 465

Where officers before entering defendant's farmyard knew no facts justifying them as reasonably discreet and prudent men to believe that defendant had liquor in his automobile and they followed him and saw keg in automobile after entering, search and seizure was illegal.

Kroska v. U. S. (C. C. A. Minn. 1931) 51 F. (2d)
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Farmyard which prohibition officers entered without warrant constituted "curtilage" of defendant's home.

Kroska v. U. S. (C.C.A. Minn. 1931) 51 F. (2d)
330

Search of an automobile without warrant is justified only by a probable cause which would be such as would establish before a competent tribunal a right to a warrant.

U. S. v. Blich, (D.C. Wyo 1930), 45 F. (2d) 627

Wherein the court held to be insufficient a showing, first, that the defendant had previously been convicted in the Municipal Court for violation of liquor ordinance, and, second, that prohibition agents had

been informed by reliable persons, whom they believed, that transportation was to take place at a certain time and place. The agents, however, refused to state the name of their informant.

Officers having no warrant and no reasonable cause to believe that automobiles contained liquor were without authority to stop and search automobiles far from the International border.

Mooring v. U. S. (C.C.A. Tex. 1930), 40 F. (2d) 267

Charge that search of automobile without warrant on report to officer that liquor would be transported to filing station was justified, held erroneous.

Brown v. U. S. (C.C.A. Fla. 1931) 47 F. (2d) 681

Test or probable cause for search and seizure is whether a reasonably discreet and prudent man would believe that liquor was being transported unlawfully in automobile. (Const. Amends. 4, 5),

Kaiser v. U. S. (C.C.A. Minn. 1932) 60 F. (2d) 410, *Certiorari* denied (1932), 53 S. Ct. 118, 287 U. S. 654, 77 L. Ed. 565.

Mere failure to offer forcible resistance to an officer, does not constitute consent.

U. S. v. Kozan (D.C. N. Y. 1930) 37 F. (2d) 415

Trier of facts should be slow in finding international and voluntary relinquishment of immunity from search without warrant when effect of testimony is uncertain.

U. S. v. Ruffner (D.C. Md. 1931) 51 F. (2d) 579

Consent given by owner to officers to search premises must be unequivocal and specific.

Karwicky v. U. S. (C.C.A. Md. 1932) 55 F. (2d) 225

Defendant's reply, "all right" when prohibition officers presented themselves and said that they would inspect premises, held not invitation to search.

U. S. v. Marra, (D.C. N. Y. 1930) 40 F. (2d) 271

Arrest of truck driver for violation, there being nothing to indicate such a violation, held unlawful and not to warrant search.

U. S. v. Valisco (D.C. N.Y. 1930) 41 F. (2d) 294

Officers information of illicit use of premises is purely hearsay and does not authorize search without warrant, unless based on personal observations or perceptions.

U. S. v. Shultz (D.C. Arz. 1933) 3 F. Supp. 273

Probable cause for seizing vehicle and searching same without warrant, must be based upon evidence leading man of prudence and caution to believe that vehicle was transporting contrabrand liquor.

Smith v. U. S. (C.C.A. N.J. 1933) 63 F. (2d) 831

Search after refusal of permission to search held unreasonable as being solely to verify suspicion and not incidental to lawful arrest.

De Pater v. U. S. (C.C.A. Md. 1929) 34 F. (2d) 275

An arrest made after an unlawful entry does not validate the entry.

Klee v. U. S. (C.C.A. Wash. 1931) 53 F. (2d) 58

The guarantees under the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended.

Boyd v. U. S., 116 U. S. 616

Gouled v. U. S., 255 U. S. 298

Go-Bart Importing Co., v. U. S., 282 U. S. 344

Grau v. U. S., 287 U. S. 124

Sgro v. U. S., 287 U. S. 206

ARGUMENT

It was stipulated by the government that the investigators had no search warrant. (T. p. 39) It was admitted by witness, Kelly, that he and his partner Strubin, had been looking for the defendant's car from February 9th to February 17th, 1937 and during all of that time he knew the individual for whom he was looking and also had the description of the car for which he was looking and in which he expected to find liquor, and he stated that he had the information from the 8th day of February to the 17th of February as to the number of the car and had also seen the car and that the car was a 1934 Oldsmobile sedan, licence No. A-25-809. (T. p. 43)

That all of this information was within the knowledge of the officers for a period of at least eight or nine days previous to the arrest but rather than procure a search warrant they preferred to put into the mouth of the defendant his admission that he had "moonshine whisky". (T. p. 38)

It is evident that there is no way of protecting the Constitutional rights of any person, if it is possible for the officers to justify their procedure in ignoring these rights, merely by putting into the mouth of the defendant a confession.

It simply does not ring true, that an apparently law abiding citizen should answer an inquiry as to what he had in the car that it is "moonshine whisky", when there is nothing evident as to the sight or other senses. There is no necessity of ever having a search warrant. In fact, it is much better not to have a warrant. There is no need of making a showing of probable cause. It would avoid liability for an illegal and unlawful search and seizure. To violate the Constitutional rights of a citizen, it is only necessary to say that he had stated that he was violating the law.

It is a dangerous practice to establish as a precedent that the need of a search warrant is avoided and illegal and unlawful search and seizure justified by supplying by their unsupported word, an element which should have been incorporated in the application for the warrant.

Clearly, there is in the record no foundation in fact or in law that would have justified the illegal search and seizure.

The present state of facts are not analogous to the cases where it is apparent by relying upon the senses of sight and hearing that a crime is being committed and there is no time to get a search warrant, because the violator would escape.

In this case the officers substituted their word in lieu of orderly procedure when they knew the make of the car, the year and the license number and the identity of the defendant and had known these facts for nine days before the search and seizure.

The only justification for the failure to procure a search warrant is because of the defendant's alleged admission and the investigators, Strubin and Kelly, do not even agree as to what was alleged to have been said

to them. One said that he heard the defendant say that he had "moonshine whisky". (T. p. 38), and the other said that the defendant replied that he had "moonshine'.. (T. p. 36)

What excuse could the officers possibly have for not securing a search warrant? They knew the description of the car and the identity of the individual for whom they were looking and had the information at hand for nine days, but preferred to rely upon a statement that it would be so easy for them to manufacture, and so hard for the defendant to contradict, namely, that the defendant had said that he had "moonshine whisky" in the car.

Under these circumstances, anyones automobile could be searched and if nothing was found the investigators could avoid all of the responsibility incident to the making of an affidavit showing probable cause and the procuring of a valid search warrant and the proper service of the warrant.

If, on the other hand, without a search warrant and in violation of an individual's Constitutional rights, they found contrabrand, they merely have to state that he told them that he had it in the car. It simplifies the

procedure and the necessity of securing a valid search warrant by simply asking a person what he had in his automobile and the person immediately responding that he had whisky. It does not matter that the person is proceeding about his business in an orderly and apparently lawful manner and that there is nothing in his actions which would arouse the suspicions of the officers as to the violation of the law; or the fact, that there is nothing to which the senses could be directed of sight or hearing which would indicate any violation of the law.

It must be admitted by the government that the search and seizure would be unlawful and illegal if the alleged statement of the defendant is not relied upon.

The defendant is compelled to incriminate himself, so that this search may be lawful. He hasn't the protection of the Court to protect his legal rights, but is at the mercy of a couple of investigators trying to bolster up a search that is unlawful on its face, by the defendant's own words.

The methods adopted by investigators contenance as just, the shooting from the blind, snaring or trapping and inducing crimes to be committed, but has not yet justified the barbarous procedure of merely saying that he told me so, and so depriving an individual of his Constitutional rights.

CONCLUSION

This Court should correct the errors, and grant the appellant a new trial of his cause.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Appellant

No. 8686

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

J. CHARLES DENNIS,
United States Attorney.

G. D. HILE,
Assistant United States Attorney.

Attorneys for Appellee.

Office and P. O. Address:
226 Post Office Building, Seattle, Washington.

FILED

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PAUL P. O'BRIEN,

CLERK.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

On February 17th, 1937, N. F. Strubin and E. T. Kelly, Agents of the Alcohol Tax Unit, received information from a source which they had theretofore

found reliable, that the defendant Archie Poulas was to make a delivery of untaxpaid moonshine whiskey to a frame dwelling located on the westerly side of the 3100 block of Western Avenue, in Seattle, Washington, and that such delivery would be made on the afternoon of the same date, February 17th, 1937, some time after 3 o'clock (Tr. 33, 35, 37, 38, 41, 44). The information was further to the effect that the defendant would be driving a brown 1934 Model Oldsmobile sedan, bearing Washington License No. A-25-809 (Tr. 33, 35, 39, 43). Agent Strubin knew that the appellant had a reputation for being a persistent violator of the liquor laws of the United States (Tr. 34).

Acting on the information given, both Agents proceeded at about 3:30 P. M. on February 17th, 1937 to the vicinity of the 3100 block on Western Avenue Seattle, and placed this area under observation (Tr. 33, 35, 38, 41). At about 4:15 P. M. on the same date, defendant appeared driving a brown 1934 Model Oldsmobile sedan, bearing Washington License plates No. A-25-809, drove the car on the 3100 block of Western Avenue, and stopped it before a frame dwelling house

on that street (Tr. 33, 35, 38, 41, 42). The two Government Agents then drove their car to the side of the car occupied by appellant, Agent Kelly got out, approached the car in which appellant was still sitting, advised him that he, Kelly, was a Federal officer, and inquired of appellant what he had in the car. (Tr. 34, 36, 38, 40, 41, 42). Appellant answered that he had "some moonshine whiskey," or that he had some "moonshine," (Tr. 34, 36, 38, 39, 40, 42, 44). Thereupon the Agents searched the car and found on the floor of the back seat of the car five 1-gallon jugs of untaxpaid moonshine whiskey, contained in a gunny sack which had before been concealed from their view by a blanket completely covering the gunny sack (Tr. 34, 36, 40, 42, 43, 44).

Thereupon appellant was arrested (Tr. 34, 36, 38, 39).

The whiskey contained in the car could not be seen from the outside, and the Agents did not know of their own knowledge that the car did contain untaxpaid whiskey prior to the search (Tr. 40, 42, 43). Agent Kelly had before been looking for the appellant, knew

that appellant was using this particular car, and expected to find contraband whiskey in the car (Tr. 43). Kelly had been looking for this particular car from February 9th to February 17th, and had before received information concerning it (Tr. 43). Kelly, however, had not received any information regarding the expected delivery to 3100 Western Avenue until February 17th, the day of the arrest (Tr. 44). The Agents had no search warrant (Tr. 43, 49).

QUESTIONS

The primary questions presented are whether the search of appellant's car, the seizure of the moonshine whiskey, and the arrest of appellant were lawful or unlawful in view of the fact that the Government Agents had no search warrant.

ARGUMENT

Appellant's brief confines itself to a discussion of the sufficiency of the search, seizure and arrest, and we likewise confine our discussion.

Appellant's Petition to Suppress (Tr. 4, 29-31) failed to allege that appellant was the owner of the moonshine whiskey, and contained no allegation that he claimed any interest whatsoever in the liquor seized. Neither does appellant's Affidavit in Support of Petition to Suppress (Tr. 7, 8, 31, 32) contain any statement whatsoever to the effect that appellant owned or claimed any interest whatsoever in the seized liquor.

It is well established that only the owner of, or one claiming an interest in, the article seized can object to the seizure as unlawful or unreasonable.

Lewis v. United States, (CCA9) 6 Fed. (2d) 222;

Armstrong v. United States, (CCA9) 16 Fed. (2d) 62, (cert. den. 273 U. S. 766);

Kwong How v. United States, (CCA9) 71 Fed. (2d) 71.

In view of appellant's failure to claim or show any interest or ownership in the seized liquor, the Court was correct in denying the suppression of the evidence as prayed for by appellant (Tr. 36, 37).

As appellant offered no evidence whatsoever at the trial (Tr. 47), no contention can be made that any claim of ownership to, or interest in, the liquor seized was made subsequent to the hearing of the Petition to Suppress.

Apart from the foregoing, however, in view of the uncontroverted affidavits of N. F. Strubin (Tr. 33, 34) and E. T. Kelly (Tr. 35, 36) filed in opposition to the Petition to Suppress, the Court did not err in denying the suppression of the evidence.

A leading case on the validity of searches and seizures with respect to automobiles is *Carroll v. United States*, 267 U. S. 132. The facts there, in brief, disclose that the Government Agents had contacted the defendants some time prior to the date of the arrest, and arranged for a delivery by the defendants to the Agents of illicit liquor. The defendants at the time of the meeting said that they would be required to go to Grand Rapids to obtain the liquor and would be back later. The defendants had gone to the meeting in an Oldsmobile Roadster, the license number of which the Agents obtained at that time and later identified. The defendants did not reappear to make the promised delivery. Some two months later the Agents, while in their regular patrol between Grand Rapids and Detroit, observed the defendants driving in the same car. The Agents pursued the car, overtook it stopped and searched it, and found the car to contain contraband whiskey. The Agents at the time were not looking for the defendants and had no search warrant for them. The Court in an exhaustive opinion upheld the search, seizure and arrest, distinguishing between searches and seizures without a warrant with respect

to private dwellings and structures and automobiles.

The Court said in part:

“On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. * * *

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

The measure of legality of such a seizure is therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein, which is being illegally transported. We here find the line of distinction be-

“tween legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. * * * Such a rule fulfills the guaranty of the Fourth Amendment. * * *

The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. * * *

That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants. * * *

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.”

Another leading case on the subject is *Husty v. United States*, 282 U. S. 694. There the arresting officer had previously received information from a source he had before found reliable to the effect that the defendant had two loads of liquor in automobiles of a particular make and description, parked at a designated place. The officer, acting on the information, found one of the cars described at the indicated point with no one in it. Later the defendant and two others entered the car. As the defendant was in the act of starting the car, he was stopped by the officer and the two others fled. The officer searched the car and found illicit whiskey. The officer had no search warrant. In sustaining the search, seizure and arrest the Court said, in part:

“The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll v. United States*, 282 U.S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act.

“Dumbra v. United States, 268 U. S. 435, 441; *Carroll v. United States*, *supra*. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra v. United States. supra*; *Stacey v. Emery*, 97 U. S. 642, 645. * *

The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause and not unreasonable; and the motion to suppress the evidence was rightly denied.”

The case of *Kaiser v. United States*, (CCA8) 60 Fed. (2d) 410, (Cert. den. 287 U. S. 654), is squarely in point here. The facts there show that the arresting officers previously had information that certain premises were used as an office for taking orders for alcohol, and that certain other premises owned by the defendants were used as a storage plant for the al-

cohol. The information further disclosed that cars approaching the premises used for storage went through certain specified peculiar actions before actually arriving at the place of storage. On the date of the arrest, the officers observed a Ford car leave the premises used as an office. Trailing the car, it was observed that the car performed the peculiar actions which the informant had described, and was then driven to the premises reported used as a storage place. When the Ford car stopped on the latter premises, the Agents approached the car and before any arrest or search was made, they asked the occupants of the car what was contained in it. One of the defendants replied that the car contained alcohol. The officers then arrested both defendants, searched the car and found that it did in fact contain alcohol. The lower Court denied a motion to suppress the evidence so obtained, ruling that the objection that the search and seizure were unlawful was untenable. In sustaining the lower Court, the Circuit Court, after referring to the *Carroll* and *Husty* cases above cited said:

“It seems to us that the circumstances disclosed in the evidence given at the time of the hearing on the motion would lead a reasonably discreet and prudent man to believe that the operators of the car were in the illegal possession of liquor in the automobile, and that is the test of probable cause. There was certainly reasonable ground to stop the car and make inquiry, and, when inquiry was made, McCormick admitted that there was alcohol in the car. The officers then had reason to believe that a felony was being committed in their presence, and therefore had the right to arrest defendants and make the search and seizure of the liquor.”

The only material distinction between the above case and the instant one is that there the arrest preceded the search, whereas here the search preceded the arrest. The fact is immaterial. *Carroll v. United States, supra*; *Husty v. United States, Supra*.

Likewise, in *Turner v. United States*, (CCA10), 73 Fed. (2d) 838. Officers on September 1st, 1933, were informed that the defendant was back in the whiskey business. They were informed on September 25th, 1933, that he was going to another city for a load of liquor, and in addition were given the kind of car he was driving, as well as the license number of

the car. The officers watched for his return, and on September 29th, 1933, saw him in the car described approaching from the direction of the other city, followed him, and stopped his car. Upon the officers approaching him, he stated, "There is no use looking. It is full."—or something to that effect. A search of the car disclosed that it contained liquor. The Court held that the search and seizure were not unlawful, and that no constitutional right of the defendant had been violated, citing the *Carroll* and *Husty* cases, *supra*.

In *McInes v. United States* (CCA9), 62 Fed. (2d) 180, (cert. den. 288 U. S. 616), the arresting officer had previously received information from a source theretofore found to be reliable that a certain Ford coupe bearing designated license plates would be driven from California to Oregon on the Pacific Highway, and that the car would be loaded with intoxicating liquor. Acting on this information, the officer later observed the car approaching, and upon stopping it and searching it, found the liquor. This Court, citing the *Husty* and *Carroll* cases, *supra*, upheld the validity of the search and seizure.

Additional cases to the same effect are as follows:

Bess v. United States, (CCA4) 49 Fed. (2d) 884;

Roach v. United States, (CCA4) 51 Fed. (2d) 65;

Cassidy v. United States, (CCA DC) 49 Fed (2d) 504;

United States v. Notto, (CCA2) 61 Fed. (2d) 781;

Weathersbee v. United States, (CCA5) 62 Fed. (2d) 822.

Furthermore the evidence of Strubin and Kelly introduced at the trial (Tr. 37, 44) developed nothing in conflict with the affidavits previously filed in opposition to the Petition to Suppress. As a matter of fact, the evidence strengthened the Government's position in that Kelly testified he was familiar with appellant and knew that he was driving this particular car (Tr. 41). That Kelly had been looking for appellant, suspecting that appellant was using the car to transport illicit liquor. As above stated, neither the the affidavits nor the testimony of Strubin or Kelly were controverted.

It is clear from the foregoing authorities that appellant's contentions are without any merit whatsoever.

It is significant that, in his brief, appellant cites neither of the United States Supreme Court cases above cited, nor the *McInes* case, *supra*, decided in this Circuit; nor does he cite any other case which is in point except *Kaiser v. United States*, *supra*, which, as above demonstrated, is clear authority against appellant.

Appellant devotes considerable argument to the fact that it is to him incredible that anyone should truthfully answer that he has contraband articles in his possession, upon being questioned by an officer, and infers that the Government Agents were stretching the truth, if not committing perjury. There is no need to consider these arguments, inasmuch as appellant did not take advantage of his opportunity to controvert the affidavits of the Agents, and offered no evidence whatsoever on the trial. Both the Court and the jury found that the Government Agents were worthy of belief.

CONCLUSION

It is respectfully urged that the lower Court committed no error in denying appellant's Petition to Suppress the liquor seized, and in overruling all of appellant's objections which arose from the fact that such Petition to Suppress was denied and the seized liquor admitted in evidence. The judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney,

G. D. HILE,
Assistant United States Attorney
Attorneys for Appellee.

No. 8686

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—vs.—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

EDWARD H. CHAVELLE,
Attorney for Appellant.

315 Lyon Building
Seattle, Washington

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**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

There was never before the trial Court any other question than whether the car of the appellant could be searched without a search warrant. The officers set forth as a part of the proceedings that the appel-

lant was the occupant of the car; that he was in possession of it and that they had been looking for a certain individual, the appellant, and for the particular car, a 1934 brown Oldsmobile Sedan, License number A-25-809 since the 9th day of February until the date of the search and seizure and arrest on the 17th day of February, 1937. Knowing the individual they were looking for and expecting to find liquor in the car, not only had they had this information from the 8th day of February to the 17th of February, but they had also seen the car and had made no attempt to get a search warrant and there was nothing as they came alongside of the car which was standing still, that would indicate that there was any whisky in the car. (T. p. 43).

In the case of *Alvau v. United States*, (C.C.A. 9), 33F, (2d) 222 the court held that one who was a guest or an employee at the time of the unlawful search and seizure was entitled to claim benefit of motion to suppress although he didn't join in petition for suppression, did not own the building and claimed no interest in the still, where at conclusion of the testi-

mony he joined in the motion to withdraw evidence secured through such search.

This case indicates that claiming ownership is not a condition precedent to asserting violation of your constitutional rights by an unlawful, unwarranted search and seizure.

In the case of *Kelly v. United States*, (C.C.A. 8) 61 F. (2d) 843, 846. 86 A.L.R. 238, the Court stated:

“The question seems well settled . . . that one who is not the owner, lessee, or *lawful occupant* of the premises searched cannot raise the question under the Fourth Amendment of unlawful search and seizure.”

This case seems to squarely denounce and refute appellee's contention that you must be an “owner” before you can invoke protection of the Fourth Amendment from unlawful search and seizure because the cases cited conclusively show that if you are a *guest* and *employee* or in control of the searched premises you may invoke protection under the Fourth Amendment.

In the present case, it was admitted in the record, appellant drove the car and at the time of the unlaw-

ful search and seizure was a lawful occupant of the car. Appellee's statement and authority is confined alone to a case where the defendant has disclaimed any connection or interest in the searched premises.

In *Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520, Mr. Justice Sutherland observed:

“The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies, and the assurance against any revival of it, so carefully embodied in the fundamental law is not to be impaired by judicial sanction or equivocal methods which regarded superficially may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.”

The three cases that counsel for appellee has cited are instances where the defendant disclaimed any relation whatever with the place and none of them pretend to support a situation such as the case at Bar where the appellant was the occupant of the car and in possession thereof and had driven the same to the curb where it was parked and appellant was sitting in the car at the time of the search and seizure.

Appellee cites *Kwong How v. United States*, 71 F.

(2d) 71, as authority for his position that only the owner of, or one claiming an interest in the article seized can object to the seizure as unlawful and unreasonable. But in *Kwong How v. U. S.*, *supra*, in his testimony, appellant disclaimed all dominion over the place and the property where the search and seizure took place.

The only question before the Court was the question whether or not an automobile could be searched and liquor seized under the facts of the present case. Counsel for the appellee at the time of his argument cited and now cites in his Brief the case of *Carroll v. United States*, 267 U. S. 132, and relies strongly and almost entirely upon the Carroll case and it is appellant's purpose to show that the Carroll case has no application to the facts of the case at bar and is not in point.

The case of *United States v. Allen* (S. D. Fla. 1926) 16 F. (2d) 320 is squarely in point and distinguishes the Carroll case.

The Court said:

“The government, in urging the admission in evidence of the liquors in question, relied entirely

upon the holding of the United States Supreme Court in the case of *Carroll, et al, v. United States*, 267 U. S. 132. The rule of law controlling the question of search and seizure of automobiles on the public highway, without the aid of search warrant is clearly and distinctly laid down in the Carroll case. The rule is to the effect that such searches and seizures are legal when the facts and circumstances within the knowledge of the seizing officers, and of which they have reasonable trustworthy information, are such in themselves to 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile . . . ', which is the subject of such seizure."

The facts in the Carroll case, which led the Supreme Court of the United States to the conclusion that this rule had been met, and that the search and seizure in that case was justifiable, showed that the prohibition officers, who made the seizure, some time prior to that time had a conference with the defendants, Carroll and Kiro and arranged to purchase from them three cases of whiskey. The defendants advised that they would go and get the liquor, they went and returned, or one of them did, and said that he could not get the liquor that night. The defendants came to this conference in an Oldsmobile roadster, which was seen

by the prohibition officers, and the number of the license tag was taken by them.

About two months later these same prohibition agents passed this same car, bearing the same license number, on a public highway going westward, presumably from Detroit. The same men who agreed to sell the liquor at the previous meeting in Grand Rapids were in the automobile, and the court held that these officers, seeing and knowing the occupants of the car, knowing the car by the license tag, which it bore to be the same car, which said occupants used at the time of the agreement to furnish liquor in violation of the law, were justified in believing the car was being used to unlawfully transport intoxicating liquor, and were justified in searching and seizing same without a search warrant.

Then the Court went on to say:

“Do the facts in the instant case measure up to the rule laid down in the Carroll case? I do not think so. They *show* that the seizing officers had no personal knowledge whatever of the alleged unlawful transportation of liquor in the car seized; *that they acted* upon information (the source of which, or the reliability of which, was not disclosed); that a Studebaker sedan car, with blue

headlights and a driving light in the center, would be, or might be used on this road at the time in question for the unlawful transportation of liquor. It is admitted that other Studebaker cars—that many Studebaker cars are equipped in the same way as the car in question.”

The Court went on further to say:

“That the facts upon which these prohibition agents based their right to search and seize this automobile without a search warrant would justify them in stopping and searching any and every Studebaker sedan automobile that might happen to have blue headlights, a driving light in the center, and with dust and dirt on the back of it.”

Mr. Chief Justice Taft, while sustaining the seizure in the Carroll case said:

“It would be intolerable and unreasonable if prohibition agents were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary . . . But those lawfully within the country, are entitled to use the public highways and have a right to free passage without interruption or search, unless there is known to a competent official, authorized to search, probable cause for believing that these vehicles are carrying contraband or illegal merchandise.”

The Carroll case is distinguishable because there the prohibition agents *knew* and it was within their own personal knowledge that defendants were transporting liquor. They ordered liquor from the defendants, had prearranged meetings, while in the appellant's case, the agents had no personal knowledge, and they acted on rumor and uncertain information, the source of which, or the reliability of which was not disclosed, and it is evident from these facts, that they did not have probable cause and that the Constitutional rights of the defendants were infringed upon.

Another case squarely in point and one which also distinguishes the Carroll case is *United States v. Blich*, (D. C. Wyo. 1930) 45 F. (2d) 627.

The facts of this case show that two prohibition officers received what one agent says in his affidavit, was reliable information, and what the agent who testified orally, designates as the advice of a reliable informant, that the defendant at a certain time would be making delivery of liquor at a certain designated place on the evening in question; that this information was received between four and five in the afternoon,

and that the designated time of the transportation was between seven and eight in the evening. The officers proceeded to the place, saw defendant's car and saw a stone jug of whisky protruding from a rip in gunnysack and detected odor of whisky, also officer said that defendant had been convicted of liquor violations before.

The Court said:

"The Carroll case strongly intimates that the procedure of searching automobiles for liquor violations upon public highways is only permissible when a search warrant cannot be obtained on account of the moving nature of the vehicle, I believe that the probable cause in such a case ought to be such as might be established before a competent tribunal as the basis for a search warrant, otherwise the mental action of the officer amounts to no more than a suspicion, which is admittedly under the *Carroll case* and many other cases, not sufficient for search and seizure without a warrant. If the officers who in this case made the search and seizure had proceeded upon their information to secure a search warrant (which counsel for defendants, claim they had ample time) it would have clearly been obligatory upon them to produce the evidence of the party who purported to know of the transportation about to be carried out, otherwise to attempt to secure a warrant would have been upon mere information and belief, which the courts hold insufficient. I am

of the opinion that the only safe rule to adopt will be to require officers who presume to make a search and seizure of automobiles on the public highway without warrant, to disclose every element which goes to make up their case of probable cause, and this rule reasonably includes the source of their information, so that the Court may determine whether or not under all the circumstances a case of probable cause has been established, and perhaps as well to restrict the informers to a sincerity of purpose."

"A fair analysis of the Carroll case simply amounts to this, that upon probable cause, an automobile may be searched and seized upon a public highway by proper authorities, without a search warrant, but that every case must rest upon its own bottom and be controlled by its own facts and circumstances as to the sufficiency of the probable cause."

In the case of *Wisniewski v. United States*, (C.C.A. 6th Circuit) 47 Fed. (2d) 825, the facts show that the officers on August 23rd, 1930, had been "informed" that the defendant who was said to be dealing in intoxicating liquor was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the City of Grand Rapids; that similar information was secured on four different occasions from the same informer, that it was always reliable;

that delivery was to be made in a Studebaker sedan bearing license No. 594-190 or in an Essex coach bearing license No. 594-191, and the court held that this alone was not sufficient in itself to constitute probable cause, and the reason that search and seizure was upheld in that case was due to the fact that they saw the defendant take from the car jugs of whisky in a burlap sack out of the car and put it into another car and then they stopped him.

The court said that the previous information would amount to no more than a mere suspicion, and the later developments were what made the search and seizure good.

In *Brown v. United States* (C.C.A. 9) 4 F. (2d) 246, Judge Rudkin said:

“That prior to the time the officers had been informed that the plaintiff in error was a bootlegger, license number of the car had been furnished, but the source of information not disclosed in the case, that on other occasions, the plaintiff in error had delivered packages, and beyond the foregoing, the officer had no knowledge of any kind and no information of any source that a crime was being committed in his presence.”

Judge Rudkin said:

“While an officer may arrest without a warrant for reasonable cause, he can only count on evidence, not mere suspicion.”

In *Husty v. United States*, 282 U. S. 694, cited by appellee in his brief, there the Court emphasized the fact that when an attempt was made to stop the defendants, two of them fled and attempted to escape arrest and that their acts were such as to cause their apprehension, arrest and subsequent search.

The car at that time was moving, so the Court justified the arrest due to the fact of the two defendants attempted escape, and that it was reasonable to believe that contraband would be found in the car.

We have no suspicious circumstances in the case at Bar.

In *Kaiser v. United States*, (C. C. A. Minn. 1932) 60 F. (2d) 410 the facts are different entirely in that the operation was notorious in the neighborhood and that the neighbors knew about the plant and storage warehouse and the neighbors had been interviewed and the premises had been under observation for a period of two months and during that period the evi-

dence disclosed that cars approached the premises used for storage, went through certain specified peculiar actions before arriving at the place of storage; that just previous to the arrest, the officers made two long investigations and observation of the car checking it specifically and that they had been under observation for a period of two months and emphasizing the system adopted by the cars approaching the storage warehouse to signal their approach by snapping off some of their lights and leaving other of their lights on and when on the day in question a car was seen to leave the premises used as the office and performed the same peculiar actions and was then driven to the premises used as the storage warehouse, would lead a reasonably discreet and prudent man to believe that the operations were illegal and that they were in possession of contrabrand.

That there was no probable cause shown in the present case.

In *Turner v. United States*, (C. C. A. 10), 73 F. (2d) 838, cited by appellee in his brief, the facts there disclose that the agents having information that the

defendant was back in the whisky business and were informed that on the 25th day of September, 1933, that the defendant was going to another city for a load, the officers went to defendant's home and found on checking that he was absent from his home. Having secured this information and the information as to the kind of car defendant was driving and the license number, they watched for his return and upon his approaching they attempted to stop his car and he speeded away in an effort to escape the officers and they pursued him and the fact that the defendant failed to stop caused the officers to give pursuit in an attempt to apprehend him, was a fact which would constitute probable cause.

In the other cases cited by appellee, he seems to emphasize the fact that they are to the same effect and decisive of the present case.

In *Bess v. United States*, (C. C. A. 4) 49 F. (2d) 884, the facts disclose that they saw defendant unload the liquor and saw liquor in the car.

In the case of *Roach v. United States*, (C. C. A. 4) 51 F. (2d) 65, was a case where the defendant was fleeing. He was running away from the law.

In *Cassidy v. United States*, (C.C.A., D.C.) 49 F. (2d) 504, they had been watching the defendant for a considerable period of time and knew that he went from particular premises with certain packages and this particular day they saw him take a package to these premises and subsequently came back and started fixing up the upholstery in his car when they arrested him.

In the case *United States v. Notto*, (CCA 2) 61 F. (2d) 781, cited by appellee in his brief, the officers in this particular case smelled the odor of whisky and there was a load of barrels in the truck which were evidently so heavy that the truck sagged from their weight and the evidence of the smell of intoxicating liquor gave the officers probable cause for making the search.

In *Weatherbee v. United States*, (CCA 5), 62 F. (2d) 822, cited in appellee's brief the officers saw the defendant removing the package and subsequently put the package back in the car and then proceeded with the search.

If in the present case, it is unnecessary to have a search warrant, there can be no case where it is ne-

cessary to have one. When there are no circumstances of any sort, which would justify the officers in believing that there is evidence of probable cause and they can justify a search without a warrant by merely stating that the defendant told them that he had contraband in the car and with the further statement that they had information, without disclosing its source or reliability, then search warrants can be abolished so far as the apprehension of automobiles and their search is involved. There would be no necessity for an officer having to show under oath, probable cause, if he can avoid the legal necessity of so doing by the bare statement that somebody told him that they had whisky in their car.

None of the cases cited by appellee in its brief are in point. Each of them have some facts which clearly disclose evidence of probable cause to believe a crime was being committed. In the present case there was no evidence of any violation of the law and the trial Court only remarked that there was a difference between searching a home and a person's automobile.

This we will readily agree with, but it does not carry with it a justification for searching anyone's automobile without a search warrant. If a person's constitutional rights mean anything at all, then the appellant's petition in this case should be granted.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Appellant.

315 Lyon Building
Seattle, Washington

